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No. 71-1332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellants,

v.

DEMETRIO P. RODRIGUEZ, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF OF AMICI CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

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INTERESTS OF AMICI CURIAE

Amici Curiae are representatives of state governments, or political subdivisions, in 38 states which have systems of school financing which can be viewed as inconsistent with the *Serrano-Rodriguez* rule. In most of these states suits are pending as part of a coordinated campaign attacking the nation's school financing system. In consequence of time limitations *amici* have not been able to secure the joinder in this brief of all forty-nine of the

American states with systems of school finance inconsistent with the supposed constitutional principle.[1]

The state and local governments represented by *amici curiae* all in varying degrees suffer from severe budgetary and financial stringency. The school systems in each and all of the states, including the school systems in the so called "wealthier" districts, have contractual commitments to suppliers of services, bondholders, and teachers and/or teachers' unions foreclosing any possibility of significant reduction in expenditures in such districts. It has been authoritatively estimated that the cost of increasing expenditures in each state to the level of the higher districts in the state would approximate 8 billion dollars per annum. In some states this outlay would result in immediate and severe revenue crises while in others it would result merely in an exhaustion of state taxing resources to the detriment of the state's ability to provide other essential health and welfare services.[2] For all practical purposes, the only recourse of the states would be a quest for relief from the federal government and a resulting reduction in state and local control over local school systems.

In each and all of the 49 states fiscal control of expenditures beyond the state foundation program is vested in local legislative bodies or school boards. The *Serrano-Rodriguez* rule would shift control of almost all save minor increments to educational expenditures to state legislative bodies and would result in an enforced fiscal unification of state school systems and drastic restructuring of the

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[1] Only Hawaii has a school finance system meeting this newly invented "imperative", and that system was not the product of democratic choice but an inheritance from territorial government.

[2] See the testimony of Dr. Charles Benson, Hearings Before the Select Committee on Equal Educational Opportunity, United States Senate, 90th Congress, 2nd Session, at pages 76-79 (1971) (hereinafter referred to as "Mondale Committee Hearings").

political institutions and processes of all but one of the fifty states.

The undersigned local school districts would be confronted in the event of application of the *Rodriguez* rule with either the need to carry out drastic reductions in educational expenditures, with concurrent wholesale teacher firings, disruptions, and teacher strikes or with a vastly increased tax burden for education wholly unanticipated by municipal officials and residents and ruinous to numerous property owners, including elderly property owners, with fixed incomes.

Many of the undersigned states have within their borders large cities with severe urban problems and substantial numbers of disadvantaged residents. According to recent studies the interests of most large cities would suffer from application of the *Serrano-Rodriguez* rule, since most large cities have higher than average tax bases and lower than average tax effort for education in relation to assessed valuation. These states and cities would be hindered and impaired in their ability to address urban problems by a constitutional requirement that they devote huge sums of money to elevating rural districts without pressing educational needs or social problems to the spending levels of the "wealthiest" suburbs. See United States Office of Education, *Finances of Large-City School Systems: A Comparative Analysis*, D.H.E.W. Publication # OE7229 (1972); Select Committee on Equal Educational Opportunity, United States Senate, *The Financial Aspects of Equality of Educational Opportunity and Inequities in School Finance* (January 1972), pages 66-73; Hearings Before the Select Committee on Equal Educational Opportunity, United States Senate, 92nd Congress, First Session, part 21, pages 10897, 10905 (Statement of Norman J. Chachkin, NAACP Legal Defense and Educational Fund, Inc., Novem-

ber 30, 1971); Myers, *Second Thoughts on the Serrano Case*, City: The Magazine of the National Urban Coalition, Volume 5, No. 6, page 38 (Winter 1971); Taylor, *The Richmond Ruling*, The Washington Post, January 16, 1972 pages B 1, B 5;[3] Bassett, *Leaders of Urban Schools Oppose Dollar-A-Scholar*, Baltimore News American, March 16, 1972, page 1, column 4.

Each and all of the undersigned states possesses a republican form of government within the meaning of Article Four of the United States Constitution. Each and all desires to maintain that system of goverment, and opposes transfer of the power of the purse of state legislatures to courts, either their own or those not of their creation.

STATEMENT OF THE CASE

The decision of the District Court in the *Rodriguez* case purports to impose as a constitutional imperative the proposition, discoverable nowhere in any constitutional provision, congressional debate, or even congressional bill that "the educational opportunities afforded the * * * children of the state of Texas are not made a function of wealth other than the wealth of the state as a whole, as required by the equal protection clause of the Fourteenth Amendment to the United States Constitution." (*Rodriguez v. San Antonio Independent School District*, 337 F. Supp. 280 at 286.) This "principle" has been somewhat differently formulated by the "constitutional convention" originating it, the meeting of the minds of the authors of Coons, Clune and Sugarman, *Private Wealth and Public Education* (1969): that a system is invalid which makes "the quality of a child's education a function of the wealth of his parents and neighbors". See also *Serrano v. Priest*, 5 Cal. 3d 584, 487

[3] Also in Mondale Committee Hearings, *supra*, part 21, pp. 10465, 10472.

P. 2nd 1241.[4] The first branch of this formulation, that quality of education should not be a function of parental wealth constitutes a direct threat not merely to differences among and local control in school districts but to private schooling, and indeed all family provided supplements to education. The second branch of this formulation, that seeking constitutionally to divorce educational quality from neighborhood characteristics, constitutes a threat not merely to existing systems of school financing but to the survival of the independent powers of local and, indeed, state governments as well as to rights of free association and migration.

These possibilities and dangers are not fanciful. The present school financing litigation is being coordinated throughout the country through the Lawyers Committee for Civil Rights under Law, assisted by the framers of the *Serrano* thesis, Professor Coons and his colleagues. The Assistant Director of the Lawyers Committee, Mrs. Sarah Carey, has outlined the impending attack on private schools:

> "(Mrs. Carey) Now if the constitution declares education to be a fundamental interest it might be you could attack private schools on that ground.
>
> (Senator Mondale) The key to the *Green* case was deliberate segregation, white flight, designed to escape the court order.
>
> (Mrs. Carey) That is right.
>
> (Senator Mondale) You might say that there is a similar constitutional principle, and that no one can escape the public schools. Maybe that will be the law. Go ahead.

[4] The *Serrano* court conceded "Plaintiff's contention — that education is a fundamental interest which may not be conditioned on wealth — is not supported by any direct authority." (487 P. 2d at 1255) It reached its conclusion in an opinion replete with quotations from the Coons book.

(Mrs. Carey) That is roughly what I wanted to say" (Mondale Committee Hearings at page 6884, Appendix C hereto) (App. 28a).

Dr. Coons has also suggested that in light of the fiscal requirements imposed by *Serrano*:

> "I think the amount that would already be taken in personal income and other statewide taxes for the general support of education would be enough so that most people would not be able to afford the support of public education and private education. * * * *And of course, it is up to the state as to whether they can do that.* The state, after all, would set some kind of adequate minimum which every child should have available in public education. A district would have to stay in the system." (Mondale Committee Hearings pages 6883-84, Appendix C hereto) (emphasis added) (App. 27a).

Other writers have acknowledged that there is little stopping place in plaintiffs' logic short of compulsory state-run boarding schools on the early Soviet model. See Kirp, *The Poor, The Schools and Equal Protection*, in Harvard Educational Review, *Equal Educational Opportunity* (1969), at 155-56. It is integral to the *Serrano-Rodriguez* principle that local school districts are to be forceably prevented from spending additional funds on education beyond those authorized by the State.[5]

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[5] Professor Coons, in a minor qualification of this, has proposed a system of "power equalizing" which would allow districts to supplement state authorized funds from local property taxes provided that rich districts surrendered a portion of the taxes raised for this purpose to the poorer districts. He has acknowledged "of course, there are certain problems inherent in that, not the least of them the political problem of recapture from the local district. I am informed by people who know these things that it is politically difficult to establish a system in which, if Beverly Hills is to spend $1,000, it may raise $1,500. It is cosmetically bad politically." (Mondale Hearings (App. 24a) page 6882). Even this largely cosmetic modification of the equal-spending rule has drawn violent criticism from some zealots for ju-

The effect of the principle and its allied conception of education as a "fundamental interest" is to proclaim that education is so "fundamental" that parents and local governments must be prevented from spending their money on it. "The application of this principle to all areas of consumption would do away in effect with income differences, destroying the whole system of incentives on which every society is founded." Coleman, Preface to Coons, *Private Wealth and Public Education* (1969) at XIV. See Simons, *Economic Policy for a Free Society* (1948) at 28-29:

> "A society based on free responsible individuals or families must involve extensive rights of property. The economic responsibilities of families are an essential part of their freedom, and like the inseparable moral responsibility are necessary to moral development. Family property in the occidental sense of the primary family, moreover, is largely the basis of preventive checks on population and of the effort to increase personal capacity from generation to generation, that is, to raise a few children hopefully and well or to sacrifice numbers to quality in family reproduction."

Counsel associated with the committee coordinating the *Serrano-Rodriguez* litigation have not merely acknowledged its relevance for family-provided supplements to education, but also its implications for the remaining other powers of local government. Thus Mrs. Carey has told us that the rule sounds the doom of the locally collected and locally assessed property tax:

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dicial intervention in these matters. See Wise, *The California Doctrine*, Saturday Review, November 20, 1971, 78 at 82; Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 Harvard Law Review 7 at 54-59 (1970); President's Commission on School Finance, Schools, People and Money, Final Report (1972) at 33. In light of this, the *Serrano-Rodriguez* principle realistically viewed, demands full state funding, or at least fully state controlled funding, as a matter of constitutional compulsion.

"The decision does not invalidate the property tax, but it requires that if that tax is to be retained, the distribution of the income generated by it must be reformed. This probably cannot be done unless the manner in which the tax is collected is also reformed." (Mondale Committee Hearings at 6867) (App. 11a).

Further, once the fundamental objective of the proponents of this litigation is achieved — a declaration from the court that education is a "fundamental interest" — a further wholesale assault on state treasuries will begin:[6]

"And then finally — and this is an issue the press has ignored totally — if education is a fundamental interest, as the *Serrano* court declared it to be, what flows from that? * * * There are a whole lot of things in different directions that flow from the finding of fundamental interests. In other law suits which raise the point directly — which this case didn't —it may well be that you will find fundamental interest interpreted as requiring whatever kinds of support a student needs to exercise that interest the same as a criminal defendant may need counsel. The student may need transportation, he may need lunches, or special instructional aids. Ultimately, five or ten years down the road, there will be cases that flow from the fundamental interest interpretation just as there have been in the voting rights and criminal defense areas." (Mondale Committee Hearings at page 6868) (Testimony of Mrs. Carey) (App. 12a).

Still others associated with this litigation have noted that the implications of this case are not confined to education but extend to all the surviving powers and responsibilities of state and local government, and indeed to the

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[6] In *Spano v. Board of Education*, 328 N.Y.S. 2d 229, 234 (Sup. Ct. Westchester Co. January 17, 1972), the court, in declining to follow the *Serrano* and *Rodrigues* cases, perceptively referred to them as "exercises in a forensic 'game plan' ".

federal budgeting process. Thus Professor Coons has expressed the view that the cases render constitutionally vulnerable such programs as the federal impacted area aid program. (Mondale Committee Hearings, at 6848-49). Further, we are told:

> "*Serrano* 'opens a very large door', says John Silard, a Washington, D. C. attorney involved in school tax litigation. For the first time, he says, the courts are requiring 'equal protection' in public programs. They are holding states accountable for how and where they spend public money. In his view, this means 'a revolution in public services, the schools, he predicts, are merely 'the first bite at the big apple. Welfare obviously comes next, and I guess health, too.' * * * Some lawyers predict that if education is accepted as a fundamental interest, other public services are bound to follow. But they don't like to say it out loud. 'They want this to stick', one attorney says. 'You stress that education isn't like garbage. We are playing a game here. You have to (in order) not to frighten the courts away from a proposition that's sound.'" Andrews, *Tax "Revolution"*, Wall Street Journal, March 13, 1972, pages 1, 12.

Nor is this all. Professor Coons and his collaborators have included in their book an appendix entitled "The State — Nation analogy to the District — State picture", suggesting a constitutional obligation to equalize educational spending in all states. Coons, et al., *supra* at 465-68. Indeed the assumed constitutional requirement of *Serrano* and *Rodriguez* of a relationship between benefits and taxes jeopardizes not merely finance systems for various public services, state and national, but all regressive taxes (the sales tax, the property tax, etc.), all regressive expenditure programs (expenditures for national parks and for higher education, for example), and all association of regressive taxes with regressive expenditures (e.g. use of

a cigarette tax for purposes of higher education and the catalogue of other examples contained in Mr. Justice Cardozo's opinion in *Carmichael v. Southern Coal Company*, 301 U.S. 495 (1937)). Such are the implications of the principle at issue in this case.

STATEMENT OF FACTS

In the brief compass of an amici curiae memorandum in support of a jurisdictional statement, a comprehensive statement of the facts of *Rodriguez* is not in order. A number of features of the case should, however, be noted.

1. The case followed, and in large measure uncritically relied upon, the decisions of the Supreme Court of California in *Serrano v. Priest* and of Judge Miles Lord in the United States District Court of Minnesota in *Van Dusartz v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971). Indeed the *Rodriguez* opinion is inconsistent with a prior order by one of the members of the *Rodriguez* court in *Guerra v. Smith*, (W.D. Tex. No. A-69-CA-9), appeal pending, handed down on July 20, 1971 prior to the *Serrano* and *Van Dusartz* cases (Appendix A hereto). The opinion of the California court in *Serrano* is representative of that court's unrestrained approach to equal protection cases. See *Westbrook v. Mihaly*, 2 Cal. 3d 765, 471 P. 2nd 487, unanimously vacated 403 U.S. 915, invalidating a two-thirds majority requirement for school bond issues.[7] The opinion rested in

[7] Notwithstanding this unanimous reversal, the California court relied on its own opinion in *Westbrook* as precedent for *Serrano*, 487 P. 2nd at 1249. This court in *Gordon v. Lance*, 403 U.S. 1 clearly rejected the proposition that educational finance was a fundamental interest activating a strict equal protection standard-a proposition urged upon it by the appellees and by the National Education Association as amicus curiae in *Gordon v. Lance*. The pertinence of *Gordon v. Lance* and of this Court's decision in the *Westbrook* case for Serrano-type litigation has been acknowledged by one of the leaders of the Lawyers' Committee for Civil Rights sponsoring the present school financing litigation, Herschel Shanks, Esquire. (See Appendix D, 57a).

large measure upon cases and doctrines peculiar to California and was discounted in advance by Professor Coons and other proponents of the *Serrano* principle. See Coons, Clune and Sugarman, *op. cit. supra* at 452. The *Van Dusartz* case, the first intervention by the federal judiciary in these matters, was decided barely a month after its filing, by a procedure characterized by successful counsel as a 'nonappealable declaratory judgment' upon preliminary motion, after thirty minutes of oral argument, upon fragmentary briefs, on the day of the convening of a special session of the state legislature.

Upon this fragile judicial foundation, a vast superstructure of propaganda has been erected in recent months.

2. The *Serrano* opinion totally failed to cite, and the *Van Dusartz* opinion cited only to disparage, this Court's recent and clearly relevant opinions in *Dandridge v. Williams*, 397 U.S. 471 (1970) and *James v. Valtierra*, 402 U.S. 137 (1971). The *Rodriguez* opinion, true to form, failed even to cite either of these cases (to which may now be added *Lindsey v. Normet*, 40 L.W. 4189). As recognized by the court in *Spano v. Board of Education*, 328 N.Y.S. 2d 229 (Sup. Ct. Westchester Co., Jan. 17, 1972), the *Serrano* and *Rodriguez* decisions misconceived and disregarded this court's decisions in *McInnis v. Ogilvie*, 394 U.S. 322 (1969) and *Burruss v. Wilkerson*, 397 U.S. 442 (1970) in both of which cases the so-called 'Serrano principle' was urged upon this Court in the briefs of parties and amici curiae, including Professor Coons, and in both of which summary affirmances over dissent resulted.

3. None of these opinions cite or even consider the principles relating to taxation and benefits enunciated by Justice Cardozo for this Court in *Carmichael v. Southern Coal Company*, 301 U.S. 395 (1937).

4. The Rodriguez court totally failed to consider and discuss the problems of federal jurisdiction presented by the claims asserted before it including the following problems, all related to the refusal of courts to interfere with state taxing and budgetary decisions:

a) the problems presented by the Tax Injunction Act, 28 U.S.C. Section 1341, see *Samuels v. Mackall*, 401 U.S. 41 at 66 (1971); *Lynch v. Household Finance Co.*, 40 L.W. 4335, 4337 n. 6 (Sup. Ct. March 21, 1972) and authorities there cited;

b) the problems presented by the fact that the only pecuniary interest at issue was essentially that of state taxpayers in light of *Lynch v. Household Finance Co.*, 40 L.W. 4335, 4337 n. 6; *Abernathy v. Carpenter*, 208 F. Supp. 793 (W.D. Mo.), aff'd 373 U.S. 241 (1963); *Grey v. Morgan*, 371 F. 2d 172 (7th Cir. 1966); *Hornbeak v. Hamm*, 283 F. Supp. 549 (M.D. Ala. 1967), aff'd 393 U.S. 9 (1968); and the Fifth Circuit's own decision in *Bussie v. Long*, 383 F. 2d 766 (5th Cir. 1967);

c) the problems presented by the limited scope of 42 U.S.C. Section 1983, see *Snowden v. Hughes*, 321 U.S. 1 (1944); *Board of Education of Muskogee v. State of Oklahoma*, 409 F. 2nd 665 (10th Cir. 1969); *McMillan v. Board of Education*, 430 F. 2nd 1145 (2nd Cir. 1970) (Friendly J.); *Griffin v. Breckenridge*, 403 U.S. 88, 102 note 9 (1971); and *Adickes v. Kress and Company*, 398 U.S. 144, 167 note 39 (1970). See also Emerson, Haber and Dorsen, *Political and Civil Rights in the United States*, (2nd Edition 1967) at 1435.

The substantiality of these jurisdictional questions has been acknowledged even by counsel associated with the Lawyers' Committee for Civil Rights in a memorandum filed in court as an exhibit by plaintiffs in *Milliken v.*

Green, a school financing case pending in Michigan. (Appendix B hereto).

d) Further, the *Rodriguez* court did not consider the applicability of the abstention doctrine, in light of this court's clearly revelant decision in *Askew v. Hargrave*, 401 U.S. 476 (1971);[8]

e) In addition, the *Rodriguez* court did not consider the general question of lack of federal equity jurisdiction that the absence of viable remedies presents. See *McInnis v. Shapiro*, 293 F. Supp. 327, 335-36 (N.D. Ill. 1968) aff'd 394 U.S. 322 (1969); Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. Chi. L. Rev. 583 at 597-98, 600; and see the Mondale Committee Hearings, *Supra* at Part 16 B., pages 6747-48.

f) Nor were questions of justiciability considered, notwithstanding *Gordon v. Lance*, 403 U.S. 1, 6 (1971); *James v. Valtierra*, 402 U.S. 137, 142 (1971) and the *McInnis* and *Burruss* cases.

g) In addition, there was no discussion of the applicability of the Eleventh Amendment. See *Great No. Life Ins. Co. v. Read*, 322 U.S. 47, 51-52 (1944); *Georgia Ry. Co. v. Redwine*, 342 U.S. 299, 304 n. 15 (1952); *Employees of Dept. of Public Health v. Dept. of Public Health*, 452 F. 2nd 820 (8th Cir. 1971).

5. The procedure followed in determining these grave questions, including the allowance to plaintiffs of leave to file a lengthy last minute affidavit containing numerous factual allegations and the disallowance to defendants of

[8] Even Mr. Shanks of the Lawyers' Committee for Civil Rights has acknowledged that this court's decision in *Askew* puts the *Rodriguez* plaintiffs out of federal court. (Appendix D, *infra.*, p. 60a).

an effective opportunity to controvert the affidavit failed to comport with the principles of this court's decision in *Askew v. Hargrave.*

6. The delayed injunction entered by the court has a generality and breadth violating the requirements of Rule 65 (d) of the Federal Rules of Civil Procedure, derived from Section 13 of the Clayton Act, providing that any order granting an injunction 'shall be specific in terms' and 'shall describe in reasonable detail * * * the act or acts sought to be restrained'. See *Gunn v. Committee to End the War*, 399 U.S. 383, 388-89 (1970); *International Longshoremen's Association v. Philadelphia Marine Trade Association*, 389 U.S. 64, 74-76 (1967); *Watson v. Buck*, 313 U.S. 387 (1941). In addition it should be noted that the delayed injunction ordered defendant state officials to reallocate the funds available for financial support of the school system "including without limitation, funds derived from taxation of real property by school districts" notwithstanding the fact that the school districts whose funds were being reallocated were not parties to the suit. This element of the court's order is patently violative of Rule 65. "No court can make a decree which will bind anyone but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is pro tanto brutum fulmen, and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court. * * * This is far from being a formal distinction; it goes deep into powers of a court of equity. * * * It is by ignoring such procedural limitations that the injunction of a court of equity may by slow steps be made to realize the worst

fears of those who are jealous of its prerogative." *Alemite Manufacturing Corporation v. Staff*, 42 F. 2nd 832 (2nd Cir. 1930) (L. Hand, J.).

7. Subsequent to the rendition of its opinion the *Rodriguez* court passed a subsequent order purporting to exempt from its decree payments for debt service. No rationale was tendered for distinguishing between such payments and other vested obligations such as payments under teacher contracts in "wealthy" districts.

ARGUMENT

1. The burden of plaintiffs' complaint is not that the state has not equalized but rather that it has not equalized enough. Insofar as the relief sought is directed against the use by local school districts of the proceeds of local property taxation, the complaint is founded not on state action but upon the failure of the state to correct consequences of differences in private wealth. The very title of the Coons work acknowledges this. The equal protection clause and Section 1983 "was [not] meant to provide a remedy in circumstances where the state had failed to take affirmative action to prevent widespread private discrimination", nor are these provisions available to rectify "the inaction implicit in the failure to enact corrective legislation". *Adickes v. Kress and Company*, 398 U.S. 144, 167 note 39 (1970).

2. There is nothing unconstitutional about permitting revenues to be spent where they are raised. See the discussion in *Muskogee v. Oklahoma*, 409 F. 2nd 665 (10th Cir. 1969).

3. There is no classification on the basis of wealth at issue but merely a normal consequence of the division of

the nation into state and local governments. As a Professor Emeritus of Public Finance at Princeton has noted:

> "It comes as quite a shock to be told that the property tax, workhorse of the tax system, is unconstitutional after so many years of reliable service. * * * The 'rich' and 'poor' municipality must levy different rates of property tax for the support of all other local functions, but apparently the disparities of tax rates for these purposes are still constitutional; moreover, every state provides more or less state aid to local schools. * * * Mother Nature is primarily responsible for the differences in real property values * * * topography, location and other natural features result in value differences that cannot be eliminated. A given millage levy will obviously produce more revenue for a governmental unit that contains high value property than it will for a unit that contains low value property. It would be as reasonable to hold that the Rocky Mountains are unconstitutional because they are not flat enough to plow as it is to indict the property tax because a given rate of tax will not produce the same revenue in every district * * * we may not have to wait long before some court will decide that a low income family is denied equal protection of the law because it can buy less than another family with more income. Inequality of personal income would then be unconstitutional." Lutz, *Can the Property Tax be Replaced?* Wall Street Journal, February 9, 1972, page 14.

On its face the Texas system of school financing imposes no wealth classifications. Any distinctions which exist relate not to the wealth of individuals but to the average wealth of subdivisions, average wealth not necessarily coinciding wth average income because of commercial and industrial property and the fact that persons can be property-rich and income-poor and vice-versa. The statutes make no distinctions among individuals based upon their wealth. Even if they did they would not be unconstitutional in a nation the Fifth and Fourteenth Amendments

to whose constitution protect private property. Education is no more a fundamental interest than health, welfare, police protection, sanitation, or virtually all save the most ephemeral activities of local government. The fact that it is an important governmental function does not warrant the application of a strict standard of review with respect to non-racial distinctions in its finance, unless it is to be supposed even with respect to fiscal matters that legislatures exist only to decide unimportant questions. Nor does this case involve state-imposed criminal disabilities and deprivations of liberty and procedural due process to which the Fourteenth Amendment is directly addressed or the First Amendment and voting rights questions vital to the survival and functioning of the political process as to which strict judicial scrutiny may be appropriate. The present case is not an effort to protect the political process but to remove one of the most important areas of public policy from political decision making.

4. The decision of the court below rests upon presuppositions as to the relationship between educational expenditure and educational quality that are contrary to the best available evidence on the subject. See Coleman, et al., *Equality of Educational Opportunity*, (1966) (the so-called "Coleman Report" published pursuant to the terms of the Civil Rights Act of 1964, finding negligible relationship between educational cost and educational quality); Central Advisory Council on Education (of Great Britain) *Children and Their Primary Schools* (Two volumes 1967) (the so-called Plowden Report also finding no significant relationship between educational accomplishment and educational spending and class size); and see President's Commission of School Finance, *Schools, People and Money, Final Report* (1972) at X-XI and 59. ("The relationship between cost and quality in education is exceedingly com-

plex and difficult to document. Despite years of research by educators and economists, reliable generalizations are few and scattered * * * The conviction that class size has an important or even a measurable effect on educational quality cannot be presently supported by evidence.") In light of such findings Texas and other states have not acted irrationally in declining to appropriate the approximately 8 billion dollars per year necessary to raise all school districts to the level of the higher districts in each state. Nor have they — or the President's Message to Congress of March 16, 1972 — been irrational in regarding other social needs, including concentration of additional available funds on truly needy urban districts and such other programs as higher education, welfare, and mass transit as deserving of higher priorities. It is not the function of courts to choose between competing objects of public expenditure or competing educational theories. The effect of the present decisions if generally followed will be to precipitate fiscal crises first for state governments and for presently "wealthier" local districts and second and derivatively for the federal government, and to detract from the ability of all governments to address other pressing social problems. The compelling interests of the state are apparent.

5. Only a brief summary can be given of the other objections to the Draconian decree of the Texas court. The court's principle that educational differences between separate governments must be justified by a "compelling interest" would lead to efforts constitutionally to compel the national government to relieve interstate differences. It would open to constitutional attack the federal impacted area aid program, among other programs. It would open to attack any disparity in spending between different schools in the same district and result in judicial second-guessing of the detailed administration of local school sys-

tems. It would open to constitutional attack government programs relating to medical care, higher education, police funds, transportation funds and library funds. It would result in a shift in legislative struggles from struggles between subdivisions in a country whose political constituencies have been, with good reason, geographically rather than functionally defined, to struggles between program and program and social class and social class. There is no reason to believe that these struggles will be less divisive; rather the contrary. The *Rodriguez* rule may precipitate a flight to private education in the formerly "wealthy" districts. Local fiscal control of schools will be eliminated or greatly curtailed with resulting implications for educational policy and with resulting increasing use of the schools as instruments for political change.[9] Great difficulty will arise in taking account of variations in local needs and costs. The writings of proponents of judicial intervention indicate that the courts will inflict upon themselves not merely a generation of litigation but litigation in perpetuity. Judicial intervention will result in a welter of conflicting legal commands, state, federal and local, and resulting financial crises and school closings. Intervention will result in massive immediate increases in education costs similar to those that have taken place in New Brunswick to the detriment of the state's capacity to address other problems.[10] Any flight to private schools in wealthier districts will decrease the political attractiveness of increased educational appropriations in the future since the public schools would lose part of their most articulate constituency. The relief sought may result in

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[9] See Coleman, *The Struggle for Control of Education*, in Bowers (ed.), *Education and Social Policy: Local Control of Education* 64, at 77-78 (1970).

[10] See Advisory Commission on Inter-Governmental Relations, *Who Should Pay for Public Schools?* (1971), Chapter 1.

use of non-property taxes and in either substantially lower property taxes resulting in windfalls for commercial and industrial enterprises and land speculators or a possible shift to more regressive sales and value added taxes. The claims rest upon premises as to the desirability of educational levelling that are not universally shared, since even the disadvantaged may benefit from the consequences of a measure of educational inequality or the existence of bellwether school districts. The *Rodriguez* rule would lead to evasions by local subdivisions by transfer of educational functions to other agencies such as library and park boards and/or to a proliferation of the *Rodriguez* principle as these evasions are pursued. The *Rodriguez* rule will prevent introduction of innovations commanding local but not statewide or national support, as has already begun to happen in New Brunswick, and will in the end result in a reduction in society's total expenditures for education and in the total investment by the older generation in the education of the younger.[11] The underlying principles of *Rodriguez* cast in jeopardy the entire federal and state budgeting process, and presuppose constitutional limitations on regressive taxes and expenditures and "unfair" relationships of tax and expenditure that do not exist and have never been held to exist. The principle advanced is inconsistent with the delegation of powers to local government and with local home rule and will, if accepted, have consequences for differences in regulatory legislation between home rule subdivisions and differences in the legislation of states exercising power delegated to them by

[11] "The history of education since the industrial revolution shows a continued struggle between two forces; the desire by members of society to have educational opportunity for all children, and the desire of each family to provide the best education it can afford for its own children. Neither of these desires is to be despised, they both lead to investment by the older generation in the younger." Coleman, Preface to Coons, *supra* at vii.

Congress. The principle advanced will impair the tradition of close fiscal accountability of local boards of education and will in large cities terminate a process which hitherto has given varying racial and ethnic groups a voice in fiscal control of their educational system.

It has hitherto been thought to be an advantage of our system of government that states and localities are not precluded by the absence of a national majority or by the lack of means to carry out reforms on a national scale, from addressing needs that command majority support in their own jurisdictions. Similarly it has been thought to be an advantage of our system of government that local governments may address needs not recognized by a statewide majority without being open to charges that their greater means or interest constitutes a denial of equal protection of the laws. It has also been thought to be an advantage of our system that private individuals including private individuals of comparatively modest means can spend funds for social purposes not recognized by a majority at even the local level. Plaintiffs' premises about equality in education are sharply at odds with these principles, and will make educational change in the future dependent upon statewide or even national majorities.

6. As in all the school finance cases decided to date plaintiffs failed to serve with the complaint the real parties in interest in the litigation — those school districts that would be disadvantaged by adoption of the *Serrano-Rodriguez* rule. The court did not direct that notice be given to such school districts; in consequence no such districts intervened and the adversary process which would have operated in the event that such districts, or some of them, had been parties to the case did not come into operation, to the detriment of the quality of the record

and the presentation of the case for the present system of school finance. Integral to the relief that plaintiffs propose is the prevention, or at least substantial burdening, of additional local educational expenditures in so-called "wealthier" districts. Integral to it also is an immediate and artifically generated demand for massive public expenditures on abstract equalization of rural areas at a time of other more real and pressing social problems.

The *Rodriguez* decision is a recipe for a society in which political controversies are fought out at ever higher levels for ever higher stakes, by ever more violent means and in which the safety valves inherent in federal, pluralistic, and limited government will have been constricted to the point of extinction. Reached by processes and in reliance upon case authorities which cannot command considered approval, unsupported by substantial study or reasoning and based upon strongly disputed educational theory, neglectful of the jurisdictional limitations which history has imposed upon the powers of federal courts and all courts of equity, it constitutes an interference by the judiciary with the legislative power of the purse running counter to seven centuries of Anglo-American history. It constitutes an unparalleled affront to the fundamental principles of government of a nation whose very Declaration of Independence contains a remonstrance against a ruler with life tenure who "has combined with others to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws; giving his assent to their acts of pretended legislation for imposing taxes on us without our consent".[12]

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[12] See Hazard, *Social Justice Through Civil Justice*, 36 U. Chi. L. Rev. 699, 710-11 (1969).

CONCLUSION

In light of the failure of the *Rodriguez* opinion to cite or even consider this court's opinions in *Carmichael v. Southern Coal Company*, 301 U.S. 495 (1937); *Dandridge v. Williams*, 397 U.S. 471 (1970); *James v. Valtierra*, 402 U.S. 137 (1971); and *Samuels v. Mackall*, 401 U.S. 41 (1971) and in light of its clear misconstruction of the effect of this court's summary affirmances in *McInnis v. Ogilvie*, 394 U.S. 322 (1969) and *Burruss v. Wilkerson*, 397 U.S. 442 (1970), its failure to give effect to this court's pertinent decision in *Askew v. Hargrave*, 401 U.S. 476 (1971), and its failure to discuss applicable jurisdictional limitations, summary reversal, and not merely notation of probable jurisdiction, is in order. *United States v. Haley*, 358 U.S. 644; *United States v. Ohio*, 385 U.S. 9.

Respectfully submitted,

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APPENDIX A

United States District Court
Western District of Texas
Austin Division

A-69-CA-9

Janell Guerra, et al.

v.

Preston H. Smith, et al.

ORDER

Plaintiffs, as a class of students and taxpayers, seek a declaratory judgment to the effect that the Texas educational financing scheme is unconstitutional because it violates their constitutional right to equal protection of the laws under the Fourteenth Amendment in two respects: (1) Plaintiffs receive a substantially inferior education than do students in many other districts because of a lack of funds; (2) Plaintiffs must pay a substantially higher tax rate because of the low property value in their school district, while still having less money per pupil to spend.

While the extensive exhibits which the Plaintiffs presented at hearing persuasively indicate that the State is not providing substantially equal educational opportunities to all its citizens, this Court can afford no relief. McInnis v. Shapiro, 293 F. Supp. 327, 336 (N.D. Ill. 1968), *aff'd sub. nom.*, McInnis v. Ogilvie, 394 U.S. 322 (1969), held that

> There is no Constitutional requirement that public school expenditures be made only on the basis of pupil's educational needs without regard to the financial strength of local school districts. Nor does the Constitution establish the rigid guideline of equal dollar expenditures for each student.

This Court considers that binding upon the determination of the instant action.

Accordingly, IT IS ORDERED that Defendants' Motion to Dismiss for failure to state a claim upon which relief can be granted be, and is hereby, GRANTED. The above styled case is DISMISSED.

Entered this 20th day of July, 1971, in Austin, Texas.

JACK ROBERTS,

United States District Judge.

APPENDIX B

Lawyers' Committee
For Civil Rights Under Law

Suite 520—732 Fifteenth Street, Northwest
Washington, D. C. 20005
Phone (202) 628-8730

To: Attorneys Interested in School Finance Litigation

From: R. Stephen Browning [initials]

Subject: Request for Pleadings

Date: October 29, 1971

As of Tuesday, October 26, 1971, I have been notified of the suits listed on the attached sheet. If your suit is not on my list, please notify me at once and send me a copy of your complaint. If your suit is on the list, please check to see that I have all the pleadings. If I don't, please send me everything I am missing.

I am also enclosing a very timely memorandum prepared by Michael A. Wolff, the lead counsel for the Minnesota case. Van Dusartz v. Hatfield. I suspect you may find Mr. Wolff's conclusions to be helpful in developing your litigation strategy.

Hope this is helpful, and please send me at your earliest convenience those pleadings that I lack from your case.

RSB:JAB

Enclosures

State Name	*Case Caption*	*Pleadings on File at the Lawyers Committee*
Arizona	*Hollings v. Shofstall*	Complaint only (filed 10/12/71)
California	*Serrano v. Priest*	Complete pleadings file, except October California Supreme Court opinion amending the August 30th decision
Colorado	*Allen v. Otero*	Complaint only (filed 9/3/71)
Illinois	(a) *Blase v. State of Illinois*	Complaint only (filed September ?, 1971)
	(b) *Scarboro v. State of Illinois*	Complaint only (filed October ? 1971)
Indiana	?	No complaint received (filed October ?, 1971)
Maryland	*Parker v. Mandel*	Complaint only (filed October 1, 1971)
Michigan	(a) *Detroit Board of Education v. State of Michigan*	Complaint only (filed 6/19/68)
	(b) *Milliken v. Green*	Complaint only (filed 10/15/71)
Minnesota	*Van Dusartz v. Hatfield*	Three complaints filed — consolidated into one decision (October 12, 1971)
New Jersey	*Robinson v. Cahill*	Complaint only (filed 2/17/70)
New York	?	No complaint received (filed by Michael Richmond in Westchester County, October ?, 1971)
Texas	(a) *Fort Worth Independent School District v. Edgar*	Complaint only (filed 1969 (?)) and plaintiff's trial brief)
	(b) *Guerra v. Smith*	Complaint (filed 1/28/69) and complete pleading file up to order by Judge Roberts (1/20/71)
	(c) *Rodriquez v. San Antonio Independent School District*	Third Amended Complaint (filed October ?, 1968)

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October 21, 1971

Mr. R. Stephen Browning

Lawyers Committee for Civil Rights
Suite 520, 733 15th St. N.W.
Washington, D.C. 20005

Dear Steve:

Following Jack Coons' suggestion, more or less, I have done some inquiry and research concerning school-financing cases in federal court. I conferred with Professor David Louisell, a Berkeley colleague of Jack's who is visiting professor at the University of Minnesota Law School, and read some cases and textual materials. I apologize that I have not the time to write this as a thorough memorandum of law; however, in this letter I shall try to outline briefly the points of law involved, tactical considerations, etc., with the hope that such information will be useful to other lawyers who have brought or plan to bring their school-financing cases in federal court. The answers given here are by no means final; the points conveyed here should be used as a starting point for lawyers' research.

1. *Jurisdiction.* In our case, *Van Dusartz v. Hatfield* (D. Minn., Oct. 12, 1971), the plaintiff schoolchildren's cause of action arises under the Civil Rights Act, 42 U.S.C. 1983, in

that the schoolchildren in poor districts are deprived of equal protection guaranteed by the 14th Amendment by the fact that educational expenditures, and thus quality of education, were lower because of their districts' inability to raise greater sums of money from local property taxes. Jurisdiction in such 1983 actions is based on 28 U.S.C. 1343 (3) and (4). The legal theory, propounded by the Court in *Serrano* and accepted by the Court in *Van Dusartz*, is that education is a fundamental right and that classification on the basis of wealth is constitutionally suspect.

We believe that in federal court actions, the only viable cause of action is the above-described schoolchildren's cause of action. Taxpayers, parents, school districts, local governments, etc., would have great difficulty invoking jurisdiction. Section 1983 and the 14th Amendment do not seem to reach such purely fiscal problems. Nor does 28 U.S.C. 1331, the general federal question statute, confer jurisdiction both because of the 14th Amendment-reach problem and because, as to individual taxpayers, the amount-in-controversy problem.

2. *The McInnis Problem.* *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom. McInnis v. Oglivie* (394 U.S. 322 (1969) and *Burress v. Wilkerson*, 310 F. Supp. 572 (W.D.Va. 1969) *aff'd nom.* 397 U.S. 74 (1970) preclude cases brought that are based upon the educational needs of the children. This problem is discussed at great length elsewhere (Coons et al., *Private Wealth and Public Education*). However, it needs to be emphasized that, despite the fact that the U.S. District Court in *Van Dusartz* ably distinguished *McInnis* and *Burress*, the greatest danger to cases brought in federal courts is that the courts will consider *McInnis* and *Burress* to be binding precedent. Not every court will be willing, as the Minnesota federal court was, to draw the kind of fine line needed to distinguish *McInnis* and *Burress*. For that reason alone, these cases generally should be kept in state courts.

3. *The Abstention Problem.* In *Askew v. Hargrave*, 401 U.S. 476 (1971), the Supreme Court indicated that the ab-

stention doctrine might apply to cases in this area. If there is an action pending in state court which would obviate the need for consideration of federal claims in federal court, the Supreme Court indicated that the U. S. District Court might very well abstain. The language of the Court in *Hargrave* should give pause to those who would bring their actions in federal court. For one thing, if a complaint bases its claims alternatively or primarily on grounds involving state laws or constitution, a federal court might abstain until the state courts have ruled on such issues.

Basing a plaintiff's complaint, as we did in *Van Dusartz*, solely on the claim of deprivation of civil rights in the denial of equal protection might protect against federal court abstention, but there is no assurance that it will. See *Reetz v. Bozanich*, 397 U.S. 82 (1970); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), *McNeese v. Board of Education*, 373 U.S. 668 (1963) and *Monroe v. Pape*, 365 U.S. 167 (1961).

4. *Declaratory Relief Only.* In *Van Dusartz*, we asked only for a declaratory judgment declaring that the constitutional rights of the plaintiff schoolchildren are being violated by the state's system of school financing. By doing this, we avoid a three-judge court. The case law is nearly unanimous that where only declaratory relief is sought, a three-judge court cannot be convened. *Fremed v. Johnson*, 311 F. Supp. 1116 (D.C. Colo. 1970, three-judge court) at p. 1118, footnote 7 summarizes the cases on point. See also *Mitchell v. Donovan*, 398 U.S. 427 (1970), where the Supreme Court said that denial of a declaratory judgment was not the same as denial of injunction under 28 U.S.C. 1253 which permits direct appeal to the Supreme Court.

There are two clear advantages to this approach: 1.) If relief is denied, appeal is to the Court of Appeals. Thus, we avoid repeating the disastrous result of a summary affirmance as in *McInnis*. 2.) Declaratory relief arguably is a much more modest request than to ask a federal court to enjoin the operation of a myriad of statutes and to compel the Legislature to establish a non-discriminatory sys-

tem. The latter request would seem to many courts to be nonjusticiable, as the courts for many years considered reapportionment cases.

The objection can be raised, of course, as to what happens if the Legislature refuses or fails to heed the declaratory judgment of the federal court. We believe the appropriate time to be concerned about this is when it happens: In other words, plaintiffs are in a much better position after a declaratory judgment has been entered to move to amend their complaint and seek a three-judge court to enjoin the statutes. To move at the outset for a three-judge court to make sweeping changes in the financing system is to ask the court to bite off more than it probably feels it can chew.

5. *A Motion to Dismiss.* As the *Van Dusartz* case indicates, probably the best thing that can happen to your lawsuit is for the defendants to move to dismiss for failure to state a cause of action. Then the claims of the plaintiffs are in roughly the same posture as in *Serrano* which arose on a demurrer. In *Van Dusartz*, Judge Lord assumed the truth of plaintiffs' allegations in testing the cause of action. Thus he in effect said that if plaintiffs' allegations are true, the financing system is unconstitutional.

What the Judge really has done is issue a "declaratory judgment" that is nonappealable. His opinion came at a time when the Legislature was meeting to consider school financing. The opinion sets forth a constitutional standard that must be followed. This advice is given in a memorandum and order denying a motion to dismiss; from this order, no appeal can be taken without the court's approval. See *Moore's Federal Practice*, Para. 12.14 n.16. If the Legislature satisfies the standard set forth, the litigation will be ended without any appeal because of mootness. Whether this result can be reached is uncertain but it clearly is worth a try.

6. *A Nonappealable Declaratory Judgment?* In drafting our complaint, we tried another device that we hoped might avoid an appeal if declaratory relief were granted to us. In our prayer for relief, we asked the court merely

to enter an order declaring that the system violated the constitutional rights of the plaintiffs and retaining jurisdiction of the case until the Legislature responds to such declaration in order to determine what further relief (i.e. convening of a three-judge court would be appropriate. However, such retention of jurisdiction would not be effective to deprive the defendants of their right to appeal; the declaratory judgment statute (28 U.S.C. 2201) clearly states that "any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." Clearly, to proceed in this manner in order to avoid appellate review is fruitless.

As I said at the outset, this letter is not intended to provide definitive answers to the problems facing litigants in federal court; it may, however, be used as a starting point for lawyers' research. In that regard, I hope these thoughts will be helpful.

Very truly yours,

MICHAEL A. WOLFF,

Attorney at Law.

MAW:bme
cc: Prof. John E. Coons
Prof. David Louisell

APPENDIX C

(6866)

STATEMENT OF MRS. SARAH CAREY, ASSISTANT DIRECTOR, LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW

(Mrs. Carey) Thank you. My point of view in discussing the *Serrano* decision is that of an organization that has been coordinating and stimulating similar kinds of lawsuits around the country, and in many cases being involved in litigation ourselves.

I think at the outset I should state that the impact of *Serrano* has been absolutely phenomenal. In a way that far exceeds the limited nature of the decision. It is, as the professors have pointed out, a decision of the California Supreme Court, not the U.S. Supreme Court. It will apply to California only if it passes a whole series of remaining judicial proceedings.

Yet, despite these various restrictions, it has had at least as much impact, if not more, than a number of the major U.S. Supreme Court decisions in past years.

I think, trying to explain the reaction — you have touched on it earlier, Senator — that the whole spirit of this Nation has been that (6867) we are committed to a universal, equal form of education that helps all children, poor or rich. And then, suddenly we find out through this decision and the resultant publicity that, in fact, we are not doing that; we are providing education resources very much along class lines and discriminating against those who need it the most.

That is just a preface.

The *Serrano* decision has been a real mindblower in terms of the issues it has raised and the activity it has provoked, legislative and legal.

Similar Suits Filed in 26 States

At our latest count, we figured that something like 43 attorneys in 26 States have either filed or are planning to

file similar kinds of lawsuits. There is a great danger, as Professor Coons has mentioned, that some of these suits will not be adequately prepared and could prejudice the consideration of the issues by the Supreme Court.

(Senator Mondale) There is a conference scheduled on October 16.

(Mrs. Carey) That is a conference the lawyers committee is sponsoring, and we are trying to pull together—

(Senator Mondale) In Washington.

(Mrs. Carey) That is right. But, as you probably know, lawyers are difficult to control. They hide behind their clients.

(Senator Mondale) I was once a lawyer myself.

(Mr. Carey) I would like to point out that our feeling is that the *Serrano* case has raised more questions than it has answered. It is very exciting in that respect, in terms of ushering in an era of reform that will challenge the educational establishment.

Many of the questions that it raises are touched upon by the other suits that are now pending. I would like to just briefly summarize these questions, and then run through the three major categories of lawsuits that are now pending, so you have an idea of some of the issues being presented.

Three Major Questions Raised

Serrano set a negative standard. It did not say what the State had to do. It just said what it could not do; and, in so doing, it raised a number of very complicated questions, including what ought to be done about the property tax.

The decision does not invalidate the property tax, but it requires that if that tax is to be retained, the distribution of the income generated by it must be reformed. This probably cannot be done unless the manner in which the tax is collected is also reformed.

The second major question is: Should school districts be redrawn? The *Serrano* decision indicates that as long as the inequalities in resource allocation among districts are corrected, there is no need to alter present district boundaries.

(Senator Mondale) It could well be that that judgment, if sustained, would have a bearing politically in the long run about how school district lines are drawn.

(Mrs. Carey) That is right. In a number of cases now pending, the plaintiffs request redistricting as a means of sharing the wealth among various units of government.

The third one is — well, I guess, Professor Yudof has really taken care of this issue — how can intradistrict discrimination be prevented, once (6868) the money gets handed down by the State, assuming the State corrects its allocation pattern?

And then finally — and this is an issue the press has ignored totally — if education is a fundamental interest, as the *Serrano* court declared it to be, what flows from that?

In the criminal area, where the right to an adequate defense, has been declared a fundamental right, the Supreme Court has held that the State has to put the defendant in a position where he can actually fully exercise that right. This has been translated to mean if he is poor he must be furnished defense counsel; his trial transcript must be paid for; and he must be given other support to put him in an equal position with more well-to-do citizens.

Serrano Decision Deals with Fiscal Equity

(Senator Mondale) As I understand Dr. Coons' interpretation of the *Serrano* case, the court specifically was not asked to deal with the question of need; they were asked to deal with the question of what he calls "fiscal equity." So in no way does that deal with the need question. But there have been two cases, in Virginia and Illinois which sought to deal with the fairness principle, the need principle and both were lost.

(Mr. Carey) I am getting at it from a different way. The *Serrano* decision did declare education to be a fundamental interest, and it said, as a result of that, we have to do certain things with the way we spend money for education, But there are a whole lot of things in different directions that flow from the finding of fundamental interest.

In other lawsuits which raise the point directly — which this case didn't — it may well be that you will find fundamental interest interpreted as requiring whatever kinds of support a student needs to exercise that interest, the same way a criminal defendant may need counsel. The student may need transportation, he may need lunches, or special instructional aids.

(Senator Mondale) I understood Dr. Coons to say he hopes no one would bring a lawsuit of that kind now.

Did I understand you correctly?

(Dr. Coons) Yes, sir.

(Mrs. Carey) Dr. Coons does not want to have *Serrano* fouled up on its way to the Supreme Court.

(Senator Mondale) That is going to be quite a conference in October.

(Mrs. Carey) Ultimately, 5 or 10 years down the road, there will be cases that flow from the fundamental interest interpretation just as there have been in the voting rights and criminal defense areas.

To get a little more specific on these questions, I would like to outline the kinds of cases that are now pending.

Questions on Property Tax

In the property tax area, there are a number of suits, a whole line of new law, that in effect are challenging the way jurisdictions assess and administrate their property taxes. As you probably know, nationwide around half of school funds are funded through the property tax. The tax generates $33 billion, which makes it second only to the Federal income tax and the Social Security Tax. And

yet, the (6869) manner in which it is administered in most states is an outrage. It is steeped in corruption and subject to tremendous political abuse.

Even though State constitutions generally define the level of required assessment, this varies tremendously locally, so even though a State may require in its constitution assessment at full market value, the local assessors will be assessing anywhere from 5 to 10, to 25 percent of value.

Many States — and Illinois, Indiana, and Wisconsin are among the worst — have such a proliferation of assessing districts, with elected assessors who are untrained and unscrutinized and unreviewed by State agencies that they are literally tied into the local political system which negates effective assessment. Further, the number of tax exemptions granted have gone way out of control.

In Boston and in other major cities where the exempt private and public property cuts severely into potential tax bases — the loss that results from this maladministration of property taxes hits the schools the hardest, although it affects other local services.

The National League of Cities and the U.S. Conference of Mayors has estimated that maladministration of the property tax costs the cities between 30 and 50 percent of their total potential revenues.

This could mean that — in a city like Newark, the loss through the city's failure to administer the property tax properly is greater than the funds it gets through Title I, ESEA. So the Federal program, in effect, is merely making a dent in the misfeasance of local officials.

In regard to the cases that are pending, there is a major case in Texas involving as plaintiffs the school districts of Fort Worth, Dallas, and Houston. These school districts are claiming that the manner in which Texas assesses taxes is so divergent, from district to district, that they are being assessed at three or four times the amount of neighboring districts — which are being assessed below the statutory

level. That, since the State contribution to the local schools depends on the value of the property assessment in the district, they are getting hit on the other end, too. More is being taken from them and less being given back as a result of the way their properties are being assessed.

They also claim that the tax exemptions from State and Federal buildings in their jurisdictions — and these are facilities which benefit the State as a whole and not just the locality — also cut unfairly into their revenues and discriminate against them by imposing a higher tax burden.

The Fort Worth case is before a three-judge Federal court in Texas and has survived a motion to dismiss; presumably it will be decided sometime this fall. It points up very directly the second phase of the *Serrano* effort. A State may take the step that California appears to be taking, of cleaning up the manner in which it distributes its revenues once they have been collected, but, unless it also cleans up the way in which the revenues are collected, it will be hit by a second equal protection suit down the road.

This summer in June a Federal court in Alabama considered a similar issue. Schoolchildren in that case claimed that inequities in the administration of the property tax — from 6 percent of market value to 26 percent of market value — deprived them of much needed resources for their school. In other words, because the State assessors were not following the statutory level of 100 percent, they were, in (6870) effect, cutting into the school budget by several million dollars. This was the first case to hold that under the Federal Constitution that kind of divergence in the administration of property tax violates both the due process and the equal protection clauses.

The property tax reform effort is a movement that must be watched. It is really another part of the kind of thing *Serrano* is trying to accomplish.

Questions on Effects of Revenue Sharing

I think without going into it too specifically that there is clearly a Federal role in this area. If the Federal Government is going to accept some form of revenue sharing, then the funds generated under that program should not be handed out unless the States are willing to clean up their own tax mess, and, in effect, reform the property tax and other laws that generate taxes.

As I understand it, neither S. 1669 or H.R. 7796, the special revenue-sharing bills for education, includes any such provisions at present.

Suits Seeking Redistricting

A second line of cases, which is of tremendous relevance to where we go in education and what happens with school finances, are the suits that are seeking redistricting. These suits have two goals. Some of them have a fiscal goal. The plaintiffs are asking that their school district be merged with a richer neighboring district in order to share the wealth. These suits have a second goal sometimes, the separate, distinct goal of seeking desegregation of what have become racially segregated districts.

While *Serrano* promises to eliminate economic distinctions betwen rich and poor districts, this line of cases seeks to redraw district lines altogether, so you can merge rich white communities with poor minority communities. As far as school reform movement is concerned, it seems clear these suits can only provide a temporary form of relief; sooner or later there is going to have to be an overhaul of the State laws to provide for a greater State contribution. But in the short run the suits may help integrate the poorer school districts with their richer neighbors and get some additional funding into them.

To touch on the cases briefly, one of them is pending in Federal court in Texas: *Rodriguez v. San Antonio Independent School District*. In the San Antonio area, the school districts have been drawn with great skill so the

Chicanos are in one area and the whites are in another. The suit alleges that the higher the white population, the more money available. They are asking for alternative relief, either a correction of the fiscal distribution at the State level, or redistricting so that the Edgewood School District, in which the plaintiffs live, would be merged with a nearby richer district.

(Senator Mondale) I think they have something like 12 school districts within the city of San Antonio, each separately funded. And, in addition, the city fathers put all the public housing in the Edgewood School District. They are located next to an Air Force base. The children all go by Edgewood, they go somewhere else with their impact aid. The superintendent of Edgewood testified before us.

(Mrs. Carey) The San Antonio case is probably one of the worst ones. But it is clear the power to develop school districts has been greatly (6871) abused, in the same way zoning laws have been exercised to exclude poverty sectors or predominantly minority sectors.

A second case that is presently pending is the one in Richmond, Va., which I am sure everyone has read about. This is a case that follows an initial order from a Federal court ordering the city of Richmond to desegregate its schools. The plaintiffs came back a few years later and said, "Court, we cannot desegregate; the only way we can effectively integrate is by merging with the counties." The courts brought in the surrounding counties as defendants and is presently considering a metropolitan redistricting scheme. The *Richmond* case alleged both racial discrimination and the discriminatory exercise of State districting powers which resulted in the distribution of school resources of an unequal basis. There are several similar suits, one in New Jersey, *Robinson v. Cahill.*

There is one pending in Hartford, Conn., *Lumpkin v. Dempsey;* where the city of Hartford is claiming the only way you can integrate education is by reaching into the surrounding counties.

In Wilmington, Del., and Grand Rapids, Mich., there are suits similar to the *Richmond* suit, where an initial desegregation order was granted, and the plaintiffs came back for further relief, saying it is impossible to desegregate unless we join the surrounding areas as defendants.

(Senator Mondale) Do you think those cases are likely to be successful, in the absence of evidence of discrimination and segregation in the development of the lines themselves?

(Mrs. Carey) That is the issue that is being litigated, whether or not there was discrimination in the drawing of those lines. Of course, the *Detroit* case, from what the press says — which may or may not be accurate — seemed to find there was State action in the zoning practices and the way that resources were allocated.

(Senator Mondale) Within the district?

Metropolitan Desegregation Cases

(Mrs. Carey) Within the city. But also suggesting the only way — the State has the power in the entire metropolitan area, naturally, since it controls cities and can take away their powers and give them additional power. But that court seemed to be saying that the State is responsible because the situation resulted from the delegation of its zoning and financing powers.

The metropolitan desegregation cases, which are also growing in number very rapidly, raise important questions that relate to *Serrano*.

Among these are — and these are questions, I think, the committee should consider — have the States overdelegated their districting powers in such a manner as to become unwitting accomplices to local discrimination? Can the districting mess be cleared up by a simple reallocation of resources? Will the *Serrano* principle, with its elimination of economic distinctions between districts encourage in areas of de facto racial segregation a system of separate but equal schools, in effect ignoring the principles enunci-

ated 15 years ago in *Brown v. Board of Education*? Can the schools be equal if they are racially segregated? And, finally, will the remedies fashioned on the basis of *Serrano* include integrated classrooms as part of the definition of "equalization of resources"?

(6872) These are all questions way down the road. But, in the two lines of cases, each take care of only part of the problems. *Serrano* really does only get at the fiscal problem, and the metropolitan desegregation ones get at the racial issues. It would seem, unless the two are combined in some manner, we are not going to fulfill our constitutional principles.

Some of the language in the first *Hobson* decision, I think, illustrates the problem that *Serrano* could lead to, of separate but equal schools where you would make funding, the allocation of funding sufficiently equal to meet the constitutional standard, and yet the communities would still remain segregated.

The final line of cases I wanted to touch upon very briefly are the remaining school cases which more or less seek the same goals as *Serrano*. Professor Yudof has already touched on the intracity suits, and there is one in Chicago, one about to be filed in San Francisco, and another about to be filed in New York. Intracity discrimination is, again, a pattern across the country. These cases all reflect very real personal situations.

Relationship of Wealth to Educational Achievement

There are, among the post-*Serrano* cases, cases that are going a bit further in terms of raising additional related issues. The case filed initia[illegible] Detroit School Board, which was dropped — which we [illegible] about to be reinstituted — attempted to deal with one of the questions raised by *Serrano*, which is the relationship, if any, that wealth has to actual educational achievement.

I think many of the journalists raised this question. If you keep on increasing the money, can you really make

a difference in education? Aren't these children so disadvantaged that pouring more money isn't going to make any difference?

Well, the *Detroit* case tries — through a massive study based on Michigan school data — to show that there are very direct correlations between the resources provided to a school, the background of the children, and educational achievement. There are figures showing that educational achievement does at least correlate with the money invested. And, finally, the study shows the relationship of all of this to career opportunities. As we understand it, this case is going to attempt to bring to proof—

(Senator Mondale) Where is that case? Did I understand from your testimony that the plaintiff's case in Michigan was dropped?

(Mrs. Carey) It was dismissed for lack of prosecution, but it is going to be reinstated.

(Senator Mondale) This is the Urban Coalition case?,

(Mrs. Carey) It is the case for which the Urban Coalition did a study.

(Senator Mondale) Yes, I read the study. I thought it was going forward. I was surprised to hear it had been dropped.

(Mrs. Carey) Detroit got so involved in other issues that the school board did not pursue it.

But these suits are going to be moving into some of these areas of proof that raise still more questions.

Based on this background, I would like to suggest a number of actions that the Federal Government should consider.

(6873) There is, from our point of view, a tremendous need of research and hard data on which to base the various remedies that are being recommended. Such questions as the cost of municipal overburden, the differentials between city and suburban areas, are not too difficult to an-

swer. The ACIR has taken care of a lot of that. But there are very basic questions about the real costs of educating children that nobody knows about, and perhaps if the Office of Education could develop a 5- or 10-year research plan that could direct itself to this problem, it would help the results of these cases.

(Senator Mondale) I agree that we ought to have a much better and more sophisticated program of research and experimentation. But I think, if we have a 10-year plan, the Congress would await the results of that study before it helped schoolchildren. There would be one more generation down the drain.

Need Long-Term Commitment

(Mrs. Carey) Some form of long-term commitment. The performance contracts, for example, that some cities are turning to really should be watched closely from the Federal level so that other States can benefit from them if they actually work.

(Senator Mondale) I agree with you.

(Mrs. Carey) The present measurements are also focused so much on the speed, on the efficiency with which the child is moved, through the system rather than the end result, the learning.

As I think has been touched upon by the professors, I think that a lot of things ought to be done about Title I.

If the *Serrano* movement really takes fire and the legislative renaissance that Professor Coons has predicted takes place, there is clearly going to be a gap period between the time when the States assume their responsibilities and the present. During that time Title I really should be used to help make up the differences in the needs of poor students in the inner city.

Beyond that, if the States do really correct their financing schemes, Title I should probably be used as a source of funds for continuing experimentation with regard to the educational needs of the poor.

An additional action that we have kicked around that might be useful at some point — would be some kind of special Federal legislation that would give individuals the right to serve as enforcement tools in seeing that the States comply with the equal allocation of resources requirement. We felt perhaps something along the lines of the Voting Rights Act, that would put in the office of the Attorney General and in the hands of private individuals a right to enforce compliance with the constitutional standards established by *Serrano*. I think that is quite a way down the road, but those kinds of enforcement efforts, where you allow private individuals to do what the Federal Government may not do, even though it is its duty, are really tremendously helpful in moving in this kind of area.

One final comment. We have found in following these suits that many of them are outrageously expensive. Reform litigation, particularly litigation that is massive, can be extraordinarily expensive. Legislative action is far more efficient, less patchwork, and really can do the job faster.

(6874) Just to give you a specific example, the suit that was brought in the District of Columbia to enforce the initial decision in the *Hobson* case, that is, the followup suit, has cost, if you include attorneys' fees, somewhere around $200,000 to $300,000 for the appellants alone. So that is something that must be kept in mind. Marvelous as the constitutional issues are for lawyers, they are almost prohibitively expensive.

[Written Prepared Statement Omitted]

(6881) (Senator Mondale) Thank you very much for a most useful statement.

We will take about a 10-minute break here, and then I have some other questions.

(Recess.)

(Senator Mondale) Dr. Coons, in your statement you set forth a formula that you think might be used, for example, in California, based on the *Serrano* principle. On

pages 7 and 8, you have an example of how California might respond to the *Serrano* rule and equalize the financial power of each school district.

Would you describe that for the record, if you will?

(Dr. Coons) Basically, the idea is to provide each district with the same opportunity and capacity to spend so that, irrespective of whether districts were par in taxable wealth, that the tax rate locally chosen would have the same effect as it would everywhere else in the State.

For example, if the poorest district in the State were to tax itself at 33 mills, hypothetically, and the richest district were to tax itself 33 mills on its local property, that each would have the same number of dollars per pupil to spend.

It could be thought of rather simply, as a table of equivalents. The legislature might enact a table of equivalents in which the left side is a column of permissible tax levies, locally chosen by the local board ranging, let's say, from a minimum of $600 or $700 up to a maximum of, say $1,800. For each amount that the district might choose to spend on its students, there would be an appropriate local tax levy. Let's say that for 2 percent a district would be permitted to spend $1,000 per pupil. If the 2-percent levy did not raise that much locally, that district would then be subsidized to the extent of the difference. If it raised more in a rich district, the excess over $1,000 would be redistributed to pay for the poorer districts.

(Senator Mondale) So, under that formula, the poorer the district, the more subsidy; the richer the district, perhaps the greater it would subsidize others?

Equality of School District's Effort

(6882) (Dr. Coons) That is correct. But, in any event, for each and every tax rate, the same spending would be permitted so that there would be an equality of sacrifice among the districts for any given level of expenditure. If you want to spend more, you have to try harder. That is the ethical principle that is involved.

(Senator Mondale) So, the political effect would be that a poor district could not go out and campaign for a higher effort, since there will be a nice bundle of State money coming in to match the district's effort, because its valuation is so low that even though it tries, it cannot obtain adequate funds from local sources. The State will make up the difference between the $400, say, it raises per capita and the $1,400 developed in the State formula. The district will get $1,000 per head from the State government.

(Dr. Coons) Exactly.

(Senator Mondale) But there is just the reverse incentive, however, for the rich district. Are the politicians there going to say, "Let's try harder so more of our money will go somewhere else." And how is that going to work?

(Dr. Coons) We have no idea.

(Senator Mondale) How would you like to try it?

(Dr. Coons) I would like very much to.

It seems to me, looking at today's pattern of spending, Senator, we see poorer districts trying much harder than rich districts. We see them willing to tax themselves to the bone in order to support spending at one-third of one-fourth of the level of the rich districts.

Rich districts are in the habit of saying, "Look how much we care about education; we spent so much here." It would be interesting to find out whether they really do care and are willing to tax themselves at the same rate as the poor districts for that same level of expenditure.

Of course, there are certain problems inherent in that, not the least of them the political problem of recapture from the local district. I am informed by people who know these things that it is politically difficult to establish a system in which, if Beverly Hills is to spend $1,000, it may raise $1,500. It is cosmetically bad politically.

(Senator Mondale) You would get a big meeting the night you proposed that.

(Dr. Coons) Right. There are, however, ways to diminish this highly visible redistribution.

One of them is first to remove industrial and commercial property from the local tax base — a form of legislation which has been frequently suggested, anyway, and one which is inherently rational.

Tax Industry/Commerce Statewide

That is to say, take a statewide tax of 3 or 4 percent and apply it to all industrial and commercial property. The local levy then would only be on residential property. And the range of wealth among districts would have been squeezed to such a narrow spectrum, compared to the present spectrum, that there would be no problem of recapture.

(6883) If you took all the industrial and commercial wealth out of Beverly Hills and the other rich districts in California, the range of local residential wealth per pupil would be sufficiently narrow that you could operate the kind of system that I outlined in my testimony, without having to take any money away from Beverly Hills. That, it seems to me, would be a highly desirable political apparatus.

(Senator Mondale) In the absence of some kind of adjustment, in the rich district, would you not actually be encouraging private schools for the rich? Would they not say, "Well, we are in this trap where we can raise a lot of money to be sent elsewhere, or we can put downward pressure on revenue for our local schools and simply spend all of our money on private schools for our children." Since all the capital costs of constructing private schools is deductible from the taxes anyway, it is sort of publicly supported.

In other words, I am trying to think how the incentives of your program would work. I see the one point you make.

Would not a statewide income tax make more sense than trying to depend principally upon the real estate tax or some other form?

(Dr. Coons) Let me say this, that a statewide income tax could certainly be employed either in a centralized or a decentralized manner to provide the necessary funds. There is no question about that.

If you are asking, in a decentralized model, should a local income tax be preferred over local property tax, the answer is likewise "Yes," in my view. Because it seems to me that the income tax—

(Senator Mondale) I am talking about a statewide income tax.

(Dr. Coons) You could have both, as a matter of fact. No reason you could not have both.

(Senator Mondale) The income tax has additional advantages. I think it is a better reflection of wealth than a property tax.

Prefers Local Income Tax

(Dr. Coons) At least as the property tax is presently structured, there is no question, and that is why we would prefer a local income tax.

May I answer that other question which you had before about the rich district and its disincentives? It is an important question.

It depends entirely upon the formula adopted. That is to say, if the relationship between spending and tax is carefully adjusted, and, if industrial and commercial are removed from the local tax base so as to squeeze the wealth spectrum down, it is my judgment that there is no stage at which you would have a powerful incentive for rich districts to opt out of the system. But I think the amount that would already be taken out in personal income and other statewide taxes for the general support of education would be enough so that most people would

not be able to afford both the support of public education and private education. At least there would not be a sufficient number of such people that there would be any but a fringe of districts in which the demography would be such that there would be so many very rich people that they would opt out of public education altogether.

And, of course, it is up to the State as to whether they can do that. The State, after all, would set some kind of adequate minimum which every child should have available in public education. A district could (6884) simply drop out, as it were; it would have to stay in the system. Being in and paying for that system, people are going to use it — they are going to have to carry the burden of that local system, and so, there is a powerful incentive to stay in it and make it all work as a public system.

Was I responsive?

(Senator Mondale) Yes.

Would either of the other two witnesses care to respond to this question of what the States should do if the *Serrano* principle becomes law?

(Mrs. Carey) I have a couple of comments on the basis of what Professor Coons has said.

I think the issue you have raised about income taxes is a key one. The experts on property tax, who I gather you are hearing next week, all can tell you how this tax can be administered in a progressive manner, but they cannot point to any community where it is being so administered. So, we have all bought that mythology for 10, 20, or 30 years, and the evidence is piling up that, perhaps the property tax cannot, in fact, be a progressive tax. This would be a strong persuasion for income tax.

On the suggestion of removing industrial and commercial properties from the local assessment base, I think it would meet with tremendous resistance from the industrial and commercial interests. They have no desire at all to be assessed and taxed at the State level. You look at

United States Steel in Gary, Ind., they would fight it tooth and nail to prevent Indianapolis from doing the assessment, as opposed to the local assessor, who works part time for them.

On the private school issue, that is one that everyone kicks around. As a factual matter, I am not sure there's any difference right now between the Scarsdale school system and Scarsdale with a private school system. It is just the admission practices that are slightly different. At present it is a question of buying a house rather than getting into a school.

So, I am not sure that will change things from the way they are at present.

Are Private Schools Nonprofit?

Another thing to consider is whether, if private schools are actually set up as nonprofit corporations and so on, whether there would not be grounds for attacking them. There is a case, a Lawyers Committee case in Mississippi, *Green v. Kennedy,* where white parents tried to set up a school, a private school, for the purpose of avoiding integration, and the court knocked down their tax exemption on the ground that it was a deliberate evasion of the constitutional mandate.

Now, if the Constitution declares education to be a fundamental interest, it might be you could attack private schools on that ground.

(Senator Mondale) The key to the *Green* case was deliberate segregation, white flight, designed to escape the court order.

(Mrs. Carey) That is right.

(Senator Mondale) You might say there is a similar constitutional principle, and that no one can escape the public schools. Maybe that will be the law.

Go ahead.

(Mrs. Carey) That is roughly what I wanted to say.

APPENDIX D

Educational Financing and Equal Protection: Will the California Supreme Court's Breakthrough Become the Law of the Land?

Hershel Shanks*

The California Supreme Court handed down a decision last Fall which, if made applicable to other states of the Union, will require a thorough revamping of education financing laws in all states except Hawaii.[1]

The California Court held for the first time that a state educational financing system which requires local school districts of varying wealth to raise even a part of their own education funds from local property taxes violates the equal protection clause of the Fourteenth Amendment. This result followed, said the Court, because such a system discriminates on the basis of wealth in the distribution of educational resources. To the extent the local school district is required to assume the burden of supporting its public schools from its own taxes, the poorer districts are unable to provide the same level of financial support as their richer neighbors, even though the poorer district often impose on themselves higher tax rates than wealthier districts. Thus the educational opportunity — at least in economic terms — available to any child within the state depends on the wealth of the district in which he lives. "[S]uch a system cannot withstand constitutional challenge and must fall before the equal protection clause."[2]

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[1] Hawaii already has a single unified school district.

[2] *Serranto v. Priest,* L.A. No. 29820, California Supreme Court, August 30, 1971, slip op. 2. On October 12, 1971, a federal district judge in Minnesota, relying on the *Serrano* decision, came to the same conclusion. *Van Dusartz v. Hatfield,* No. 3-71 Civ. 243 (D. Minn.). This ruling came in a denial of a motion to dismiss. The Court will retain jurisdiction but defer further action in the case

California's School Finance Formula

The California system for financing public education is typical of that which prevails throughout the United States. About one-third of the support for the public school system comes from the State. Over one-half is provided by local property taxes imposed by local school districts. Six percent comes from federal funds, and the remainder from miscellaneous sources.

State aid consists of two types of grants from the State to the local school district. The first type is known as the flat grant and consists of a payment to the local school district of $125 per pupil. It is distributed on a uniform per pupil basis to all districts, irrespective of their wealth. The flat grant constitutes about half of the funds distributed by California to its local school districts.

The second type is an equalization grant intended at least partially to ameliorate the disparities arising out of the differing abilities of districts of varying wealth to support local schools from local taxes. The equalization grant assures that every school district regardless of its poverty will have available to it a certain minimum amount per pupil — $355 for each elementary school pupil and $488 for each high school student. This minimum amount would supposedly fund a so-called minimum "foundation program".[3]

To compute the size of the equalization grant, two items are subtracted from the minimum foundation program amount: (1) the State's flat grant and (2) the sum the local school district is expected to raise from its own taxes. The remainder is the equalization grant per pupil. In other words, the equalization grant consists of $355 for each elementary school pupil and $488 for each high

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pending action by the Minnesota legislature, so the ruling is not presently appealable. Since the *Serrano* decision, approximately 30 other states have filed or are considering filing *Serrano*-type suits.

[3] In fact, far more is needed per pupil to fund an adequate program.

school student less the $125 flat grant and less a hypothetical amount which would be raised by minimal local tax rates — 1 percent in elementary school districts and .8 percent in high school districts.[4] In practice, however, only the poorer districts receive equalization grants under this formula. For the wealthier districts, the flat grant of $125 plus minimal local taxes raises more than the minimum foundation program amount.

While equalization grants are to some extent equalizing in their effects, the flat grant is anti-equalizing. For the poor district, the flat grant is essentially meaningless because anything taken away from the flat grant would be made up by an increased equalization grant of the same amount. The flat grant could be repealed without having any effect on the poor district. This is of course not true of wealthier districts who do not get an equalization grant. If the flat grant were repealed, the wealthier districts would lose $125 per pupil. Accordingly, the flat grant actually widens the gap between rich and poor districts.

The result of the California system of educational financing — partially because the equalization grant does not go nearly far enough and partially because of the anti-equalizing effects of the flat grant — is a wide variation in per pupil expenditures from the poorer to the wealthier California school districts. Thus, the Baldwin Park Unified School District in Los Angeles spends only $577 to educate each of its students. By contract, the Beverly Hills Unified School District, also in Los Angeles, spends $1,231 per student.

The fundamental injustice underlying this system is highlighted by the fact that the tax rate in Beverly Hills is just over 2 percent, while the tax rate in Baldwin Park is more than 5 percent. Thus, Beverly Hills can raise far more per pupil with far less effort than Baldwin Park.

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[4] California also has an additional State program of "supplemental aid" which is available to subsidize particularly poor school districts which are willing to make an extra local tax effort by setting their tax rates above a certain statutory level.

The source of the disparity in per pupil funds available to the two districts is clear: The assessed valuation per pupil in Beverly Hills is thirteen times more than the assessed valuation per pupil in Baldwin Park. The assessed valuation per pupil is $50,885 in Beverly Hills and $3,706 in Baldwin Park.

The Court found "irrefutable" the contention that the foregoing system classifies students on the basis of the wealth of the district in which they happen to live. Indeed, "[t]he wealth of a school district, as measured by its assessed valuation, is the major determinant of educational expenditures."[5]

Requirements Under *Serrano*

Assuming that this decision becomes the law of the land, what are its implications for educational financing and public education administration?

It is of course clear that such a decision would require the revamping of educational financing systems throughout the country. But beyond this lie a number of questions. Will compliance with this decision require, or lead to, state control, if not actual operation of, local schools? In other words, does this decision spell the end of the local school district, locally controlled? Does the decision mean the end of local property taxes as a source of revenue to support public education? Does the decision require 100 percent state financing of public education? Does the decision require equal dollar expenditures per pupil for each student within a state?

Many educators and even some lawyers have assumed that the answer to all of these questions is "yes". In fact, however, the answer to all of these questions is "no". It is therefore important, at the outset, to understand what compliance with the decision will, and will not, require.

The contention that the decision will result in state control and perhaps even state operation of local schools —

[5] Slip Op. 240.

and thereby doom the local public school — is based on the assumption that the decision will require 100 percent state financing of public education. The argument is that whoever pays the piper will call the tune. Yet the assumption is incorrect. To be sure, a state *may*, but need not, comply with the decision by a system in which the state provides all of the funds for the public schools on a per pupil basis. But even if a state were to adopt a 100 percent state financing as its method of compliance, this would not necessarily mean state operation or control of local schools. Even now, local school districts are creatures of the state, created by state legislatures, and subject to all valid rules and regulations which the state legislature may decide to adopt. A state has the right under the present system of school financing to control or operate the local public schools. But in fact states have not done this, despite the fact that they provide a very substantial part of the local school districts' educational budget.

It could, of course, be argued that if states were to supply 100 percent of the local school budget, they would be more inclined to control the operations of the local school districts. This seems doubtful. Given the long history of doggedly independent local school control and operation, it is unlikely that the states would undertake to exert substantially more control over local school systems simply because the extent of their financial support of these systems increases from, say, 40 percent to 100 percent. But, in any event, the signal point to keep in mind for this purpose is that 100 percent state financing of public education is not required by the decision.

Whether state educational financing systems may still rely on local property taxes, and, if so, whether at varying tax rates, locally determined, require a somewhat fuller discussion of the Court's reasoning.

The evil which the Court found in the present system is that to some extent the number of dollars available per pupil in any given school district depends on the wealth — as measured by the assessed valuation per pupil — within that district. The Court condemned the *relation* between

educational offering (at least as measured in economic terms)[6] and *wealth* (as measured in assessed valuation per pupil). That is all the Court condemned. Compliance with the Court's decision requires only that there be a divorce in this relationship of wealth with educational offering. The Court did not say *how* the divorce shall take

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[6] Whether per pupil expenditures are in fact closely related to educational offering of educational achievement has been hotly debated since the Coleman Report's finding that "differences in school facilities and curriculum, which are the major variables by which attempts are made to improve schools, are so little related to differences in achievement levels of students that, with few exceptions, their effects fail to appear even in a survey of this magnitude." (James S. Coleman, et al., *Equality of Educational Opportunity* [Washington: U. S. Government Printing Office, 1966]). Other distinguished critics question this finding. See Guthrie, Kleindorfer, Levin & Stout, *Schools and Inequality* (1971) and Bowles, "Towards Equality of Educational Opportunity", 38 Harv. Ed. Rev. (1968), reprinted in *Equal Educational Opportunity* (Cambridge: Harvard University Press, 1969). Although a definitive answer may not be available, it is difficult to disagree with Henry S. Dyer, who writes:

> We strongly suspect that the amount of money spent on instruction can make a considerable difference in the quality of pupil performance, but how the funds are deployed and used probably makes even more of a difference. It seems reasonably clear that the effectiveness of schools is very largely a function of the characteristics of the people in them — the pupils and their teachers — but we are still a long way from knowing in useful detail what specific changes in the people or in the educational mix will produce what specific benefits for what specific kinds of children [Dyer, "School Factors and Equal Educational Opportunity", 38 Harv. Ed. Rev. 38 (1968), reprinted in *Equal Educational Opportunity* (Cambridge: Harvard University Press, 1969)].

Nevertheless, it is difficult to imagine a court denying equal funds to the poor because differences in per pupil expenditures have not been shown to make a difference. On the contrary, courts appear to have assumed that dollars will make a difference see *McInnis v. Shapiro*, 293 F. Supp. 327, 331 (N.D. Ill. 1968), *affirming mem. sub nom. McInnis v. Ogilvie*, 394 U.S. 332 (1969); *Hargrave v. Kirk*, 313 F. Supp. 944 (M.D. Fla. 1970), vacated on other grounds, *sub nom. Askew v. Kirk*, 401 U.S. 476 (1971)), although successful, plaintiffs may find themselves put to the proof, see *Serrano v. Priest*, slip op. 26-27; *Hobson v. Hansen*, 269 F. Supp. 401, 437 (D.D.C. 1967), *affirmed sub nom. Smuck v. Hobson*, 408 F. 2d 175 (D.C. Cir. 1969), and especially *Hobson v. Hansen*, 327 F. Supp. 844 (D.D.C. 1971).

place, or what systems of educational financing will meet this test of "non-relatedness of wealth and educational offering".

There are many ways of breaking this relationship which do not require abandonment of local taxes — even property taxes — as a source of support for local school systems. For example, a state could provide that $1,000 per student will be available in each district within a state and that the local district must raise as much of this amount as would be produced by a 2 percent property tax. If that would produce in any particular district less than $1,000 per pupil, the state would make up the difference. If such a tax would produce more than $1,000 per pupil, the excess would be required to be paid to the state. This is a true 100 percent equalization formula.[7]

The system just described breaks the relationship between wealth and educational offering, but it retains a significant reliance on local property taxes to support local schools. It may be argued, however, that this system, like the system in which the state provides all of the funds for local education, produces an educational straightjacket in which every school district is limited to $1,000 per pupil regardless of the importance which a particular local school district places on education and regardless of the effort which the residents of a particular district are willing to make to support their public schools. This is true, but the system may be varied so as to provide for different amounts depending on the effort (as expressed in its tax rate) the local district is willing to make to support public education. In other words, under the holding in the *Serrano* case, it is constitutionally permissible to allow a variation in educational offering to depend on

[7] In the example, the state *requires* the local district to impose the 2% tax on real estate. However, the state need not make this requirement: The local district may be permitted to raise the money any way it wishes — by a real property tax or by any other form of taxation. Or it may be permitted to raise less than the amount that would be produced by a 2% property tax, in which event the 2% property tax would be used only as a measure of the state's equalization obligation.

the effort the local district is willing to make. Remember that only disparities emanating from variations in wealth are forbidden by the *Serrano* decision.

Suppose the formula is varied somewhat, to provide a differential in per pupil expenditures available to any district based on variations in local effort (i.e., local tax rates). Consider a system which provides that for each mill of local tax imposed by the local district, the local district would receive $50 per pupil. If one mill of tax produces less than $50 per pupil, the state will make up the difference. If it produces more than $50 per pupil, the excess must be paid to the state. Under this system, the local district decides how many dollars per pupil it wishes to provide for public education. The greater effort it makes, as expressed in its tax rate, the greater per pupil expenditures it will have for its public education system. But the amount available to the local district does not depend on its wealth. A 30 mill tax will produce the same revenue per pupil ($1,500) in the poorest as in the wealthiest district. This system has been described as "district power-equalizing"[8] because under it each district has the same *power* to produce educational funds for its own local school system, regardless of its wealth.

However, there are likely to be vociferous political objections to a district power-equalizing system because of the effect of such a system on the wealthier districts.[9]

To understand where the political outcry will come from in any district power-equalizing scheme, consider the following scenario, which is summarized in Table I. Assume, as is now the case, that each district raises its own school funds through local taxation but, for simplicity, without any state contribution. Assume further that District B, the wealthiest district in the state, is five times as wealthy in assessed valuation per pupil as District A, the poorest

[8] See Coons, Clune & Sugarman, *Private Wealth and Public Education*. Cambridge: Harvard University Press (1971).

[9] However, such an effect necessarily results from any system which withdraws from the wealthier districts the advantages they previously had as a result of their wealth.

district in the state. District A imposes a 6 percent tax which produces $600 per pupil (1 percent tax = $100 per pupil). District B, however, imposes only a 3 percent tax, but this produces $1,500 per pupil (1 per cent tax = $500 per pupil). Now suppose (see Hypothetical 1 in Table I)

TABLE I

Present System

(Each District Retains What is Produced By Its Own Taxes)

District A (Poor)			District B (Wealthy)		
Tax Rate		Expenditures Per Pupil	Tax Rate		Expenditures
6%	=	$600	3%	=	$1,500

Hypothetical 1, Using A District Power-Equalizing System
(All Districts Raised to Level of Best System)
(1% Tax Rate = $500 Per Pupil)

District A (Poor)			District B (Wealthy)		
Tax Rate		Expenditures Per Pupil (Including State Grant)	Tax Rate		Expenditures Per Pupil
3%	=	$1,500 (i.e., $300 in local taxes and $1,200 state grant)	3%	=	$1,500

Hypothetical 2, Using A District Power-Equalizing System
(1% Tax Rate = $250 Per Pupil)

District A (Poor)			District B (Wealthy)		
Tax Rate		Expenditures Per Pupil (Including State Grant)	Tax Rate		Expenditures Per Pupil
6%	=	$1,500 (i.e., $600 in local taxes and $900 state grant)	3%	=	$750
			or		
			6%	=	$1,500

that this hypothetical state decides to comply with the *Serrano* decision by a district power-equalizing formula. One way to do this would be to provide that any district which taxes itself at the rate which District B presently

taxes itself will receive just as much money as District B. In other words, for each percent of tax imposed by the local district, the state will insure that the district will receive $500 per pupil. The effect of this district power-equalizing formula is to raise the entire state to the level of the wealthiest district, provided only that the other districts make the same effort (by imposing the same tax rate) as the wealthiest district. In the case of District A, it could reduce its tax rate from 6 percent to 3 percent and increase its per pupil expenditure 2½ times, from $600 to $1,500. District B would retain its present tax rate of 3 percent and present per pupil expenditure of $1,500.

The problem with this district power-equalizing formula is that it is enormously expensive and is likely to be regarded politically as prohibitively expensive. The total cost, the politicians will say, is too high.

The state will then consider a district power-equalizing system that is pegged at a lower level (see Hypothetical 2 in Table I). The state will insure that the local district will receive, not $500 for each percent of tax it imposes, but $250. (Anything raised in excess of $250 for each percent would of course be paid to the state). This is all right with District A, the poorest district in the state. District A retains its 6 percent tax rate and, instead of having $600 per pupil, it will have $1,500 per pupil. However, District B now has a serious problem which is politically powerful residents are not likely to welcome. If District B retains its present 3 percent tax rate, it will find that it now will receive only $750 per pupil instead of the $1,500 per pupil which was previously produced by a 3 percent tax rate. If District B feels strongly that it does not want to lower the per pupil funds available to it for public education, as it is likely to feel, it will be faced with the prospect of doubling its tax rate from 3 percent to 6 percent in order to retain the same per pupil expenditure. In short, District B will either have to increase its tax rates substantially or decrease the quality of education it provides for its children. This is the fly in the political ointment of district power-equalizing. However, from a constitutional

point of view, this result follows only because District B no longer has an advantage because of its wealth.

Some argue that the result of the *Serrano* decision will be the destruction of the public school system. Whether the state adopts a district power-equalizing system or 100 percent state financing, it is unlikely to raise the level of all systems to that of the best. The result will mean a lowering of the quality of our best schools. No longer will they serve as the beacon light for the future. All those who have been accustomed to a higher level of educational quality are likely to abandon the public schools if they can afford it.

Others argue, with at least equal persuasiveness, that a judicial command to remove the disparities attributable to wealth will vastly improve the overall quality of the schools, without eliminating either diversity or freedom to experiment. These people argue that as a practical or political matter those citizens who control both the public schools and the legislatures, supported by the broad middle class who are entirely dependent on those schools, will make a new effort to aspire to the best for all, once they realize that even the wealthy can have the best only if it is also available, assuming equal effort, to the poor.

In exploring the latitude in devising school financing systems which is still available under the *Serrano* decision, it is clear that variations in per pupil expenditures are permitted if they result from variations in effort or tax rate exerted by the local district. However, differences in per pupil expenditures may be made to depend on a number of factors in addition to variation in effort. This, of course, follows from the fact that the *Serrano* decision forbids only variations which stem from differences in wealth. Accordingly, state financing systems may, consistent with the *Serrano* decision, permit differences in per pupil expenditures resulting from a host of variations in educational needs. High school students, for example, may be given more than elementary students. Adjustments may be made for districts whose school population is geographically dispersed so as to give them special

transportation problems. Other reasonable, and therefore allowable, adjustments might be made for the differential purchasing power of the dollar in different parts of the state, or the state formula may provide additional funds for any district willing to adopt and support special instructions or guidance programs.

In short, the latitude which remains after the *Serrano* decision is very wide indeed; the only thing that the decision condemns is wealth-related discrimination.

Will *Serrano* Become the Nation's Law?

The foregoing discussion was based on the assumption that the *Serrano* case would become the law of the land. We now turn to the question of how likely it is that this will occur. This question will involve a consideration of the history of the effort to obtain a judicial decree requiring the equalization of school resources, including the story of some litigation efforts that failed; a consideration of the constitutional theory on which the *Serrano* case rests, including its strengths and weaknesses; a consideration of whether the Supreme Court as now constituted is likely to be receptive to the position of the plaintiffs in the *Serrano* case, with special attention to straws in the wind provided by cases during the Court's last term; and finally to questions of judicial and litigative strategy which might affect the result in the United States Supreme Court.

In February 1965 a short notice by Arthur E. Wise entitled "Is Denial of Equal Educational Opportunity Constitutional?" appeared in *Administrator's Notebook*.[10] Although the subject generally was in the air,[11] this appears to be the first published suggestion that the present system of financing public education is unconstitutional. There followed a rash of articles, dissertations, books and book reviews — criticizing, developing, and sharpening the

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[10] Volume XIII, p. 1.

[11] See, *e.g.*, C. Benson, *The Cheerful Prospect: A Statement of the Future of Public Education* (1965).

analysis, and providing new materials and ideas.[12] Much of this scholarly output pointed to the conclusion that the present system of financing public education unconstitutionally discriminated against the poor.

Simultaneously with the publications, a number of lawsuits were instituted to test the validity of the proposition that the present system of educational financing was unconstitutional — in Michigan, Illinois, Virginia, California, Texas, and elsewhere.[13]

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[12] Horowitz, "Unseparate but Unequal — The Emerging Fourteenth Amendment Issue in Public School Education," 13 U.C.L.A. L. Rev. 1147 (1966); Wise, "The Constitution and Equality: Wealth, Geography and Educational Opportunity" (Univ. of Chicago, doctoral dissertation, 1967); Kurland, "Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined," 35 U. Chi. L. Rev. 583 (1968), reprinted in C. Daly The Quality of Inequality: Suburban and Urban Public Schools, Chicago: Univ. of Chicago Press (1968); Kirp, "The Constitutional Dimensions of Equal Educational Opportunity," 38 Harv. Educ. Rec. 635 (1968), reprinted in Equal Educational Opportunity (1969); Horowitz & Neitring, "Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place Within a State," 15 U.C.L.A. L. Rev. 787 (1968); A. Wise, Rich Schools, Poor Schools: The Promise of Equal Educational Opportunity, Chicago: University of Chicago Press (1969); Coons, Clune and Sugarman, "Equal Educational Opportunity: A Workable Constitutional Test for State Financial Structures," 57 Calif. L. Rev. 305 (1969); "Developments in the Law — Equal Protection," 82 Harv. L. Rev. 1065 (1969); Kirp, Book Review, 78 Yale L. J. 908 (1969); Michelman, "Foreword: On Protecting the Poor Through the Fourteenth Amendment," 83 Harv. L. Rev. 7 (1969); Shanks, "Equal Education and the Law," 39 The American Scholar 255 (1970), reprinted in W. R. Hazard, Education and the Law New York: Free Press (1971); Silard and White, "Intrastate Inequalities in Public Education: The Case for Judicial Relief Under the Equal Protection Clause," 1970 Wisc. L. Rev. (1970); Coons, Clune & Sugarman, Private Wealth and Public Education Cambridge: Harvard University Press (1970); Shanks, Book Review, 84 Harv. L. Rev. 256 (1970); Goldstein, Book Review, 59 Calif. L. Rev. 302 (1971); Kaplan, Note, "Constitutional Law: Financing Public Education Under the Equal Protection Clause," 23 Fla. L. Rev. 590 (1971).

[13] Many of the cases are listed in Coons, Clune and Sugarman, *Public Education and Private Wealth*, p. 289 nn. 4-5.

The first case to reach judgment was the Illinois case, *McInnis v. Shapiro*,[14] in which a three-judge federal district court granted the defendants' motion to dismiss, thereby rejecting the equal protection argument advanced by the plaintiffs. Although the court found that "the inequalities of the existing arrangement are readily apparent,"[15] it concluded that the system was not entirely irrational. The Illinois statutes allowed local communities to control local schools, to experiment in educational financing and to determine their own tax burden in terms of the importance they placed on education. This gave the system sufficient legislative justification to sustain its constitutionality. Moreover, the court found that the judiciary was ill-equipped to order funds allocated on the basis of so nebulous a concept as "educational need," as was urged by the plaintiffs.

The *McInnis* decision was a serious setback, especially as it was a unanimous decision of a three-judge court. However, the Supreme Court still sat in Washington, and it was there that the plaintiffs promptly repaired.

However, the Supreme Court just as promptly dealt with the case by affirming, in a *per curiam* decision, on the basis of the jurisdictional statement filed by the plaintiffs in support of their appeal.[16] Apparently, the Supreme Court felt it could dispose of the case without benefit of briefs on the merits or oral argument.

Prior to the Supreme Court's decision in *McInnis*, the defendants in the Virginia case, styled *Burruss v. Wilkerson*,[17] presented a motion to dismiss to a single district judge who was thus required to rule on the substantiality of plaintiffs' constitutional contention. Without the benefit of the Su-

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[14] 293 F. Supp. 327 (N.D. Ill. 1968).

[15] 293 F. Supp. at 331. Per pupil expenditures varied between $480 and $1,000.

[16] *Sub nom. McInnis v. Ogilvie*, 394 U.S. 322 (1969). Mr. Justice Douglas would have noted probable jurisdiction.

[17] 301 F. Supp. 1237 (W.D. Va. 1968) (denying motion to dismiss), 310 F. Supp. 572 (W.D. 1969) (dismissing the case after trial).

preme Court's ruling in *McInnis*, Chief Judge Dalton ruled that the question was substantial and that a three-judge court must therefore be convened:

> Poverty does appear to be a factor contributing to the conditions which give rise to the plaintiffs' complaint. It is clear beyond question that discrimination based on poverty is no more permissible than racial discrimination. . . .[18]

A trial was had in the *Burruss* case and the facts established were even more appealing from the plaintiffs' point of view than those alleged in the *McInnis* complaint. Plaintiffs established that they were from a poor rural Virginia county and that their extreme poverty prevented them from providing an even marginally adequate school system, despite the fact that their school tax rates were unusually high and far in excess of many counties with well-financed school systems.

However, by the time the three-judge court in *Burruss* was ready to hand down its decision on the merits, the Supreme Court had already ruled on the *McInnis* case. Nevertheless the district court took the occasion in its opinion dismissing the complaint to observe:

> The existence of such deficiencies and differences is forcefully put by plaintiffs' counsel. They are not and cannot be gainsaid[19]

However, the Court found that

> The circumstances of [the *McInnis* case] are scarcely distinguished from the facts here[20]

Thus, the Court dismissed the case, but added

> While we must and do deny the plaintiffs' suit, we must notice their beseeming, earnest and justified appeal for help[21]

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[18] 301 F. Supp. at 1239.
[19] 310 F. Supp. at 574.
[20] *Ibid.*
[21] *Ibid.*

The *Burruss* court seemed to be inviting the Supreme Court to take another look.

So the *Burruss* plaintiffs also appealed to the Supreme Court. But the result was the same, a *per curiam* affirmance on the basis of jurisdictional papers without the benefit of briefs on the merits or oral argument.[22] If anything, the Supreme Court appeared to have "dug-in" by its decision in the *Burruss* case.

With two Supreme Court rulings against them, lawyers around the country who had been pressing these suits and exploring legal arguments to support them, paused for some serious stocktaking. A number of suits simply withered away. The Harvard Center for Law and Education, one of whose top priorities at its inception only a short time earlier had been to press equal education lawsuits, now turned its primary focus elsewhere. Interest in the issue lagged.

But for those who continued to press the struggle, a number of developments seemed to augur well. One was the expansion of equal protection doctrine in the Supreme Court itself. Shortly after its *per curiam* decision in *McInnis*, the Supreme Court articulated more explicitly and in greater detail than it had ever done before a new and far broader standard for judging the constitutionality of legislation subject to attack under the equal protection clause.[23] To appreciate this expansion of equal protection law, a short bit of background is necessary.

Chief Justice Warren has noted that

> The concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged.[24]

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[22] 397 U.S. 44 (1970). Mr. Justice Douglas and Mr. Justice White would have noted probable jurisdiction.

[23] *Shapiro v. Thompson*, 394 U.S. 618 (1969).

[24] *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

Or as Mr. Justice Harlan put it:

> The Equal Protection Clause prevents states from arbitrarily treating people differently under their laws. Whether any such differing treatment is to be deemed arbitrary depends on whether or not it reflects an appropriate differentiating classification among those affected.[25]

Thus, though the equal protection clause does not prevent government from treating people differently, it does prevent different treatment which is not adequately justified or which is based on inadequate reasons. Accordingly, in any case where legislation is subjected to attack under the equal protection clause, the court must decide what is adequate state justification for the state's differing treatment.

Historically, adequate justification meant that the statute represented a reasonable means to accomplish a valid purpose. In order to mount a successful attack under the equal protection clause, a suitor had to establish that the distinctions embodied in the law were arbitrary and unreasonable. As the Supreme Court stated in a 1935 case, "A statutory discrimination will not be set aside as the denial of equal protection of the law if any state of facts reasonably may be conceived to justifiy it".[26] This has come to be known as the "rational basis" test.

In recent years, however, a stricter standard appears to have been applied in some cases. The emergence of this stricter standard began in cases where the Supreme Court declined to accept "any reasonable" justification for distinctions based on race. As early as 1944, the Court said that classification based on race were "suspect" and therefore had to bear a greater burden of justification.[27]

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[25] *Harper v. Virginia Board of Elections*, 383 U.S. 663, 681 (1966) (dissenting opinion).

[26] *Metropolitan Casualty Insurance Co. v. Brownell*, 294 U.S. 580, 584 (1935); see also *McGovern v. Maryland*, 363 U.S. 420, 425-426 (1961) and cases there cited.

[27] *Korematsu v. United States*, 323 U.S. 214, 216 (1944); see also *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

Shortly after its decision in the *McInnis* case, the Supreme Court ruled more explicitly than it had ever done before that in certain cases reasonable justification was no longer enough to sustain a statute. In these cases, the standard of review was far stricter; differential treatment would be considered to be adequately justified only when the government convinces the Court that the differential treatment is *necessary to promote a compelling governmental interest.*[28] This has come to be known as the "compelling interest" test. Shortly thereafter, the Supreme Court made it clear that the stricter standard of review was applicable to cases involving discriminations based "on wealth".[29] The post-*McInnis* development seemed to bode well for another *McInnis*-type effort.

Then the first educational financing case was won in the lower court *Hargrave v. Kirk.*[30] Hargrave presented a much narrower issue than was presented to the court in *McInnis*, but it certainly trenched on *McInnis* ground.

Hargrave involved a Florida statute which provided that any Florida county that imposes on itself more than 10 mills of property tax for educational purposes will not be eligible to receive state funds for the support of its public education system. The plaintiffs there argued that this statute effected a discrimination based on wealth because it distributed taxing authority for educational purposes by a standard related solely to the wealth of the county. The plaintiffs pointed out that the statute permitted Charlotte County to tax itself up to $725 per pupil without losing state support for its public education system, but limited Bradford County to only $52 per pupil on pain of losing state support for its public education system.

In a unanimous opinion invalidating the Florida statute, Circuit Judge Dyer stated:

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[28] *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

[29] *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 807 (1969).

[30] 313 F. Supp. 944 (M.D. Fla. 1970), judgment vacated on other grounds, *sub nom. Askew v. Hargrave*, 401 U.S. 476 (1971).

> What apparently is arcane to the defendants is lucid to us — that the Act prevents the poor counties from providing *from their own taxes the* same support for public education which the wealthy counties are able to provide.[31]

This holding too seemed to provide hope for a future victory in a broader *McInnis*-type case.

The third encouraging development was the publication of *Private Wealth and Public Education* by John E. Coons, William H. Clune, III, & Stephen D. Sugarman.[32] As this writer stated in a review in the *Harvard Law Review*,[33] this book "is clearly the most sophisticated, careful and thorough analysis of the subject which has yet appeared". While the book does not say anything that has not been said — or, at least, adumbrated — before, it does say it better. It provided a careful analysis of existing school financing systems and explains in considerable detail and with great effectiveness how they operate to the disadvantage of poorer districts. It explores at length district power-equalizing systems. Finally, it stresses the need for a limited judicial attack on the present system — an attack which would seek to have the court outlaw wealth-related discriminations, but would not try to persuade the court to itself reallocate funds on the basis of a nebulous concept of educational need, as the plaintiff in the *McInnis* case attempted to do.[34]

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[31] 313 F. Supp. at 947.

[32] Cambridge: Harvard University Press (1970).

[33] 84 Harv. L. Rev. 256 (1970).

[34] It is helpful in any equal protection analysis to understand that the equal protection does not demand or command equality. It is framed in negative, not positive, terms: "No State shall . . . *deny* . . ." It forbids inequality. While logically, it is true, equality and inequality are mutually exclusive and exhaust the universe, it nevertheless makes a great deal of practical difference whether we ask, on the one hand, whether particular treatment is unequal in a particular respect, or whether, on the other hand, we ask whether particular treatment is equal in all other respects. We may be able to decide what is unequal — an inquiry which can easily be narrowed and pinpointed — without having the haziest notion as to what is equal. To determine what is equal requires omniscience with re-

However, by all odds the most encouraging development in the somewhat somber post-*McInnis* era is the stunning victory in the *Serrano* case itself.

Further Analysis of Serrano

Let us turn then to an analysis of the California Supreme Court's reasoning: The first question for the Court was whether the "rational basis" test or the "compelling interest" test should be applied. As previously noted, it seems clear from explicit United States Supreme Court statements that the "compelling interest" test applies to cases involving classifications based on wealth.[35] That the California system for financing public education classifies on the basis of wealth, the Court found plain. Therefore, on this ground alone, the Court concluded that the "compelling interest" test should apply. However, the Court also appeared to rule that the "compelling interest" test applied for another independent reason. The United States Supreme Court as indicated that the "compelling interest" test applies whenever a "fundamental right" is involved.[36] In the *Serrano* case the California Supreme Court concluded for the first time that education was a fundamental right or interest,[37] and therefore required the application

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spect to the infinite aspects to any particular distribution of benefit or burden, plus the ability to measure or weigh each aspect in comparison to the others — an impossible task, certainly for the judiciary.

In short, the equal protection clause is a negative command, and the only relief a successful suitor can legitimately seek is the removal of the inequality *he* attacks.

[35] *McDonald v. Board of Election Commissioners,* 394 U.S. 802, 807 (1969), citing *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1968).

[36] *McDonald v. Board of Election Commissioners, supra,* at 807; citing *Kramer v. Union Free School District,* 395 U.S. 621 (1969).

[37] The Court appears to use right and interest almost interchangeably. The Court speaks of the "right to education, which we have determined to be fundamental" (Slip op. 22 n. 13); a "number of fundamental interests [including] rights of [criminal] defendants" (Slip op. 33); the court speaks of comparing "the right to an education with the rights of defendants in criminal cases and the right to vote"

of the "compelling interest" test. Having concluded on two grounds that the "compelling interest" test was applicable, the Court then turned to whether the California system for financing public education met that test. The Court had no difficulty in concluding that California's system of financing public education was not necessary to promote a compelling state interest. Accordingly, the Court condemned the system as a violation of the equal protection clause.

Both legs of the Court's analysis have their shortcomings, but the result is correct.

Taking the second leg first, it is true that the United States Supreme Court has indicated that the compelling interest test is applicable when a fundamental right is involved, but this is patently erroneous. For that reason it is highly unlikely that the Supreme Court would itself apply such a rule if that were the only basis for granting relief.

Assuming elementary and secondary education to be a fundamental interest,[38] we often discriminate — and properly so — in its distribution. For example, we discriminate among students by providing more money for high school students than for elementary school students. We provide different courses for students with different interests. We provide special facilities for the culturally deprived. All of these instances of differing treatment may be reasonable, wise and desirable. But they are hardly necessary to promote a compelling state interest — unless we torture

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(Slip op. 29); the court concludes that "the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest'" (Slip op. 42).

[38] College education may or may not be different from secondary education. Consider the following example. A state university makes available to any qualified sudent, upon payment of a $1,000 tuition fee each year, a university education which costs the state $3,000 per year. The qualified student who cannot afford the $1,000 tuition fee is denied the $2,000 grant which the state in effect makes to the student who can afford the $1,000 tuition fee. Cf. *McMillan v. Garlick*, 430 F. 2d 1145 (2d Cir. 1970).

those words to encompass ideas which they do not now contain.

The same kind of examples could be cited with respect to any interest whose fundamentality, unlike education, is unquestioned. Surely the right to vote is a fundamental interest. Yet convicted felons are commonly denied the right to vote. No one would suggest, however, that this form of discrimination must be justified by reference to a compelling state interest if it is to be sustained against attack under the equal protection clause. Both the denial and the grant of the franchise to convicted felons are reasonable rules, and neither rule is unconstitutional even though a fundamental interest is involved.

That the "compelling interest" test is not applicable simply because a fundamental right is involved may also be demonstrated by considering the two constituent elements involved in any equal protection analysis. The first element may be denominated as the "basis of classification", such as wealth or race. This element has also been described as "the classifying fact"[39] or "the differentiating classification".[40]

The second element which is involved in any equal protection analysis is the "benefit" or "detriment" which government is distributing differentially on the basis of the classifying fact. The benefit or detriment may be the franchise, a particular educational resource, or a jail term. In every equal protection analysis the question is, or should be, whether the particular classifying fact can appropriately be used as a basis for the differential distribution of the benefit or detriment involved.

To say that the "compelling interest" test is applicable whenever a fundamental interest is involved is to say that we can determine whether an equal protection violation has occurred simply by examining the nature of the benefit

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[39] Coons, Clune & Sugarman, Private Wealth and Public Education, p. 342.

[40] Mr. Justice Harlan in *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 681 (1966) (dissenting opinion).

or detriment which is differentially distributed, without regard to the nature or character of the classifying fact. It is to say that no distinctions with respect to fundamental interests can be made unless they are necessary to a compelling state interest. This argument falls of it own weight.

This does not indicate, or even imply, that the fundamentality of the interest involved is either irrelevant or unimportant. The fundamentality of the interest has a significance to another, perhaps crucial, aspect of a proper analysis of the *Serrano* problem, to which we shall return.

The other leg on which the *Serrano* decision stands is that the "compelling interest" test is applicable to wealth as a differentiating classification, and that wealth is so used in this case. With the statement of principle that government should not be permitted to classify on the basis of wealth unless to do so is necessary to promote a compelling governmental interest, few could disagree.[41] Whether the *Serrano* case involves a discrimination based on wealth is another question. I believe it does not.

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[41] Even Mr. Justice Harlan (who has dissented from most of the equal protection cases on which plaintiffs rely in wealth discrimination cases) agrees that discrimination based on wealth is unconstitutional:

> It is said that a State cannot discriminate between the "rich" and the "poor" in its system of criminal appeals. That statement of course commands support . . . *Griffin v. Illinois*, 351 U.S. 12, 34 (1956) (dissenting opinion).

> The States, of course, are prohibited by the Equal Protection Clause from discriminating between "rich" and "poor" *as such* in the formulation and *application* of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich. *Douglas v. California*, 372 U.S. 353, 361 (1963) (dissenting opinion) emphasis supplied as to the word "application").

However, strangely enough, Justice Harlan does not appear to require the application of the "compelling interest" test to wealth classifications. See *Dandridge v. Williams*, 397 U.S. 471, 489 (1970) (concurring opinion); *Shapiro v. Thompson*, 394 U.S. 618, 659-61 (1969) (dissenting opinion).

The *Serrano* case involves, instead, a discrimination based on ability to pay. The difference is subtle, sometimes difficult to grasp, but nevertheless important. A law prohibiting all people earning less than $3,000 per year from using a public park is a discrimination based on wealth; one forbidding entry to a park unless a three dollar admission fee is paid is a discrimination based on ability to pay. In one sense, it may be argued both come to the same thing: Neither the poor man nor his child can afford the three dollar admission fee, so they are fenced out just as surely as if they had been denied admission to the park because of the father's failure to earn more than $3,000 per year. However, from the viewpoint of equal protection theory, it makes a good deal of difference. It is much more difficult to justify a discrimination based on wealth than on ability to pay. For example, all would agree that the "compelling interest" test should be applicable to a law that forbad poor people from buying tickets to the municipal opera. But what about charging the poor man $15 for a seat? Or how about charging the poor man the same toll as the rich man on a state turnpike?

In short, the "compelling interest" test is always applicable to wealth discriminations.[42] But not all discriminations based on ability to pay are to be judged on the basis of this more stringent test. To argue that all discriminations based on ability to pay are subject to the "compelling interest" test would mean that government could never impose a uniform fee on all citizens.

When is fee paying or discrimination based on ability to pay unconstitutional? We know that in some cases it is not permitted. For example, in *Harper v. Virginia Board of Elections*[43] the Court struck down a $1.50 poll tax. The case involved, strictly speaking, not a discrimination based

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[42] Except for so-called benign wealth discriminations, such as welfare payments (which discriminate in favor of the poor) or graduated income tax (which discriminates against the rich). On benign racial classifications, see "Developments in the Law — Equal Protection," 82 Harv. L. Rev. 1065, 1104-1120 (1969).

[43] 383 U.S. 663 (1966).

on wealth (although it is widely cited for this proposition), but a discrimination based on ability to pay (or fee-paying). Rich and poor alike were charged the $1.50 poll tax. The statute did not say to the poor man who manages by dint of great sacrifice to come up with the $1.50 poll tax, "You are not permitted to pay the $1.50 poll tax." The indigent citizen was denied the franchise only if he did not have the $1.50. The state would clearly have accepted the fee from an indigent person who was willing to pay the fee. Therefore, the statute discriminated on the basis of ability to pay, rather than wealth, although the effect may be and often is the same; namely, to fence out indigent voters.

The Court stated:

> A State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter *or* payment of any fee an electoral standard.[44]
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> * * * * * *
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> To introduce wealth *or* payment of a fee as a measure of a voter's qualification is to introduce a capricious or irrelevant factor.[45]
>
> * * * * * *
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> [W]*ealth or fee paying* has, in our view, no relation to voting qualifications.[46]

An analysis similar to the one just undertaken for *Harper* can be made of *Serrano*. In *Serrano*, the state is not preventing or forbidding Baldwin Park from raising as much money for its educational system as Beverly Hills.[47] Baldwin Park is free to raise as much money for its educational system as it wishes. Baldwin Park's problem arises from the fact that, like the poor man who wants a seat

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[44] 383 U.S. at 666; emphasis supplied.

[45] 383 U.S. at 668, emphasis supplied.

[46] 383 U.S. at 670; emphasis supplied.

[47] If it did, such a case would be condemned by *Hargrave v. Kirk*, 313 F. Supp. 944 (M.D. Fla. 1970), judgment vacated on other grounds, *sub nom. Askew v. Hargrave*, 401 U.S. 476 (1971).

to the municipal opera, it can't afford it. Baldwin Park doesn't have the ability to itself pay for the kind of educational system it would like.

The *Harper* case and other cases cited in a footnote,[48] in which fee-paying has been condemned as violative of the equal protection clause, provide a guideline as to when discriminations based on ability to pay or fee-paying are unconstitutional; that is, when fundamentally important interests are involved.

It is at this point in the analysis that the fundamentality or importance of education becomes relevant. In short, fee-paying, or discrimination based on ability to pay, violates the equal protection clause only when the benefit or detriment differentially distributed is of fundamental importance. The California Supreme Court's discussion of the importance of education is an excellent one and fully supports the conclusion that the "compelling interest" test is applicable to the facts of that case because it involves a discrimination based on ability to pay in the distribution of a fundamentally important benefit. Needless to say, it is also obvious that California's present system of financing public education is not necessary to promote a compelling state interest, and it must therefore be struck down as unconstitutional.

The foregoing analysis, indicates that the judgment — if not all of the reasoning — of the California Supreme Court should be adopted by the United States Supreme Court. However, there is great doubt that this will occur.

The first major obstacle to an adoption of the *Serrano* judgment by the Supreme Court is, of course, the *McInnis* and *Burruss* cases. However, *McInnis* can be distinguished from *Serrano* on the ground that in *McInnis* the plaintiffs argued, not that the Constitution forbade discrimination

[48] For other cases in which fee-paying has been declared unconstitutional as it affects the poor, see *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); *Williams v. Oklahoma City*, 392 U.S. 458 (1969); and *Tate v. Short*, 401 U.S. 395 (1971).

based on wealth, but that the Constitution required the distribution of educational resources based on the "educational needs" of the students, whatever that is.[49] *Burruss* simply followed *McInnis*. Moreover, it may well be, as the California Supreme Court has suggested, that the *McInnis* and *Burruss* decisions are nothing more than a refusal by the Supreme Court to deal with the question at that time. These decisions were not, according to this view, a rejection of the constitutional position, but simply the practical equivalent of a denial of certiorari.[50] In any event, the Supreme Court knows how to overcome even a series of *per curiam* affirmances when it wants to.[51]

The second, and perhaps more serious, hesitation in predicting that the *Serrano* rule will be adopted by the United States Supreme Court is the tenor of decisions during the last term of court. To summarize, the 1970-71 term of the United States Supreme Court was disastrous from the point of view of civil rights and civil liberities advocates.[52]

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[49] The *McInnis* plaintiffs went so far as to argue — in the first case dealing with economic equality of educational opportunity — that the equal protection clause required more than equal per pupil state expenditure for "culturally and economically deprived areas" in order to equalize the educational opportunity of children from these areas.

[50] The cases came up by way of an appeal from three judge courts.

[51] E.g., *Baker v. Carr*, 369 U.S. 186, 278 (1962); *McGowan v. Maryland*, 366 U.S. 420, 511 (1961). See also *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), where the Court gave plenary consideration to an issue which had previously been ruled on in a series of *per curiam* decisions. Gobitis was, of course, overruled in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

[52] See, for example, the so-called February Sextet, led by *Younger v. Harris*, 401 U.S. 37 (1971), which sapped the vitality of *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Askew v. Hargrave*, 401 U.S. 179 (1971), which for the first time applied the doctrine of abstention to a Civil Rights Act (42 U.S.C. §1983) case; *Wyman v. James*, 400 U.S. 309, 324 (1971), Justice Blackmun's first majority opinion in which he rejected the welfare claimant's plea to privacy and stated, "[The welfare claimant] has the 'right' to refuse the [social worker's] home visit, but a consequence in the form of cessation of aid . . . flows from that refusal. The choice is entirely hers, and nothing of constitutional magnitude is involved", *Palmer v. Thompson*, 403 U.S. 217 (1971), holding that a city may close its

More specifically, however, the Court has indicated what can only be described as an insensitivity to the claims of the poor. In *James v. Valtierra*,[53] the plaintiffs attacked under the equal protection clause a provision in the California Constitution which provided that no low rent housing project could be constructed by a state public body unless the project was approved by a majority of those voting at a community election. Because the provision required voter approval of housing only for the poor, the plaintiffs contended that the provision effected a wealth discrimination as well as a racial discrimination. The Court was unable to find any unconstitutional discrimination. The opinion deals explicitly only with the question of racial discrimination, which it rejects. The claim of wealth discrimination is obliquely and lightly brushed off: referendums "always disadvantage some groups."[54] The California constitutional provisions, according to the Court, "demonstrate devotion to democracy, not to bias, discrimination, or prejudice."[55] The dissent (Justice Marshall speaking for himself and Justices Brennan and Blackmun) saw the California constitutional provision as "an explicit classification on the basis of poverty".[56] For the dissenters, it was plain that "the article explicitly singles out low income persons to bear its burden".[57] The fact that the majority explicitly treated only the question of alleged racial discrimination prompted this response in the dissenting opinion:

> It is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimina-

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swimming pools to avoid desegregating them; *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), limiting the extent to which procedural rights are available in juvenile court proceedings; and *Rogers v. Bellei*, 401 U.S. 814 (1971), holding that an American citizen by birth who was not born in this country may be involuntarily deprived of his citizenship by residing abroad.

[53] 402 U.S. 137 (1971).
[54] 402 U.S. at 142.
[55] 402 U.S. at 141.
[56] 402 U.S. at 144-5.
[57] 402 U.S. at 144.

> tion; and to me, singling out the poor to bear a burden not placed on any other class of citizens tramples the values that the Fourteenth Amendment was designed to protect.[58]

If the *Valtierra* case says anything close to what the dissenters imply it says, the *Serrano* rule is in deep trouble.

Moreover, the Court last term showed a reluctance to expand further its application of the equal protection clause — and it has refused to do so in a case peculiarly relevant to the *Serrano* case. The case I refer to is *Gordon v. Lance*,[59] which involved an attack, on equal protection grounds, on a statute which required a 60 percent majority to pass a school bond issue. The plaintiffs argued that the equal protection clause was violated because in effect "no" voters were given votes of greater weight than "yes" voters and that there was no compelling state interest requiring "no" voters to be treated differently from "yes" voters.

By the time *Gordon* reached the Supreme Court, similar cases had come up in a number of courts, some decided one way and some the other. A case from California had been decided in favor of the plaintiffs — that is, the California decision held that the so-called extraordinary majority provision was unconstitutional as a violation of the equal protection clause.[60] The California Supreme Court opinion in the *Westbrook* case far outshone anything which had been previously written on the subject. The author of the opinion was Justice Sullivan, the same Justice Sullivan who wrote the California Supreme Court's decision in the *Serrano* case. In the *Gordon* case, the United States Supreme Court ruled in a fuzzy opinion by Mr. Chief Justice Burger that extraordinary majority provisions do not violate the equal protection clause. Despite the fact that Justice Sullivan's brilliant analysis in *Westbrook* was available to the Chief Justice when he wrote, the Chief

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[58] 402 U.S. at 145.

[59] 403 U.S. 1 (decided June 7, 1971).

[60] See Stern and Gressman, Supreme Court Practice (4th ed.) §312.

Justice did not so much as give a passing nod to it. When *Westbrook* came to the Supreme Court later in the same term, the Court, in a one-sentence order, simply vacated the judgment entered by Justice Sullivan's Court, citing as authority the United States Supreme Court's decision in *Gordon v. Lance*. Whether a similar fate awaits Justice Sullivan's opinion in *Serrano* remain to be seen.

Conclusion

We may conclude with a few observations on procedural matters.

It is unlikely that the United States Supreme Court would have jurisdiction to review the judgment of the California Supreme Court in the *Serrano* case. At the present time the California judgment is not final, because the California Supreme Court has simply reversed the lower court's dismissal of the complaint and remanded the case for trial.[61] But even after trial, assuming the plaintiffs are successful, United States Supreme Court jurisdiction of this case is doubtful. This is because the California Supreme Court's judgment rests on state, as well as federal, grounds. The California Supreme Court interpreted the California Constitution as imposing the same obligations on the defendants as the equal protection clause of the federal Constitution imposes on them.[62] Accordingly,

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[61] See Stern and Gressman, *Supreme Court Practice* (4th ed.) §3.12.

[62] The California Supreme Court decision (Slip op. 17 n. 11) notes that "The complaint also alleges that the financing system violates [several provisions] of the California Constitution . . . We have construed these provisions as 'substanially the equivalent' of the equal protection clause of the Fourteenth Amendment to the federal Constitution . . . Consequently, our analysis of plaintiffs' federal equal protection contenion is also applicable to their claim under these state constitutional provisions". This, it seems to me, establishes an adequate non-federal ground for the decision, so as to eliminate the United States Supreme Court's jurisdiction to review. See generally, Stern and Gressman, Supreme Court Practice (4th ed.) §§3.31-3.32. The California Supreme Court's decision certainly does not "leave the impression that the Court probably felt constrained to rule as it

even if the United States Supreme Court ruled that the California Supreme Court had misinterpreted the Federal Constitution, the plaintiffs would still be entitled to the same judgment because of their rights under the California Constitution, on which the California Supreme Court, not the United States Supreme Court, has the last word. In effect, since the United States Supreme Court cannot change the result, it does not have jurisdiction.

As one who favors the result reached by the California Court in *Serrano*, I am not displeased that the United States Supreme Court appears not to have jurisdiction. In my view, the best chance for the adoption of the *Serrano* rule by the United States Supreme Court lies in delaying a decision on this issue for a few years. If the Supreme Court has an opportunity to see how the *Serrano* decision works in California, the high court might then be convinced to adopt it nationally. However, I fear that if it makes the decision in the next term or so, the result will be an overruling of *Serrano*, not only for the reasons heretofore set forth, but also because the replacements for Justices Black and Harlan are likely to be reluctant to begin their service with a decision that has only slightly less political implications than *Brown v. Board of Education*.

Moreover, the *Serrano* decision, unreviewed by the Supreme Court, is likely to have a healthy *in terrorem* effect on state legislatures — and perhaps Congress as well — encouraging them to eliminate the inequities in their present systems of financing public education. State legis-

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did because of [decisions applying the Fourteenth Amendment]" (*Minnesota v. National Tea Co.*, 309 U.S. 551, 554-555 (1940)), nor that the California Supreme Court "felt under compulsion of Federal law [to hold as it did]" (*Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 15 (1950)). Indeed, the California Supreme Court was no doubt fully aware of the jurisdictional problem (see, *Mental Hygiene Department of California v. Kirchner*, 380 U.S. 194 (1965)), and the language which we have quoted from the California Supreme Court decision was very probably inserted specifically for the purpose of providing an independent state ground for the decision which would defeat any attempt at United States Supreme Court review.

latures must surely realize that their failure to correct the disparities in their own systems, can only encourage the Supreme Court to adopt the *Serrano* rule on a nationwide basis.[63]

[63] It is likely to be several years before the *Serrano* issue can come to the Supreme Court, especially if new cases are instituted in federal, rather than state, court, as has just occurred in Maryland. Federal court may seem at first glance more attractive because of the availability of a three-judge district court and a direct appeal from there to the Supreme Court, as occurred in *McInnis* and *Burruss*. However, since these decisions, the Supreme Court has made it reasonably clear that federal courts should abstain from deciding this issue in deference to state court adjudication. *Askew v. Hargrave*, 401 U.S. 476 (1971). Although the *Askew* decision seems questionable (cf. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971)), if the Supreme Court adheres to it, plaintiffs in federal cases are likely to find themselves out of court without a decision on the merits.

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